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ABSTRACT

The California legislature's Joint Legislative Audit Committee has issued a report concerning the Belmont Learning Complex (BLC) and the Los Angeles Unified School District's (LAUSD's) propensity for engaging in a series of school construction projects on contaminated land. The analysis suggests that the LAUSD was made aware of the BLC site's toxic problems as early as 1989, yet apparently had not followed applicable regulations by seeking state approval of the site prior to ensuring that the wastes had been removed. The LAUSD may have also violated their own California Environmental Quality Act (CEQA) guidelines and appears to have failed to satisfy many aspects of the California Code of Regulations that govern the CEQA process. Additionally, the LAUSD may have violated the Health and Safety Code by failing to contact the Department of Toxic Substances Control prior to construction when they had "probable cause to believe" the land was contaminated. It is believed that, due to this failure of communication, the state may "pursue feasible civil and criminal actions against" offending individuals. The BLC, reported to be the most expensive high school in California history, may cost tens of millions of dollars more as remediation efforts to rid the toxic wastes from the site get underway. (GR)

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*A Special Report of the:*
JOINT LEGISLATIVE AUDIT COMMITTEE
ASSEMBLYMAN SCOTT WILDMAN, CHAIR

# THE ENVIRONMENTAL QUALITY ACT AND THE BELMONT LEARNING COMPLEX:

## A BREAKDOWN IN PROCESS

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# THE ENVIRONMENTAL QUALITY ACT AND THE BELMONT LEARNING COMPLEX:

## A Breakdown in Process

*A Special Report of the*

*Joint Legislative Audit Committee*

Assemblymember Scott Wildman

Chairman

Project Director, Bryan L. Steele

Committee Consultant

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## EXECUTIVE SUMMARY

The Belmont Learning Complex (BLC) is arguably the most expensive public high school ever built in U.S. history. Unfortunately, this school may be being built on soil contaminated with a host of human carcinogens. While there are numerous laws designed to prevent such apparent bureaucratic failure, these laws were apparently insufficient to prevent the Nation's second largest district, the Los Angeles Unified School District (LAUSD), from engaging in not one but a series of at least eight school construction projects on hazardous land.

The story of how this came about appears to be one of promises and conjecture that happens to have been based on little more than hopeful speculation. At the various phases of the acquisition and approval , District officials appear to have made and relied upon, unsupported claims.

Further, State law is very specific concerning these matters. The LAUSD's performance may not conform to certain health and safety regulations. The Health and Safety Code requires public agencies, such as the LAUSD, to formally contact the Department of Toxic Substances Control before moving forward on a project where the presence of toxic hazard is *suspected*. When applicable agencies, such as the LAUSD, fail to address this requirement, the Health and Safety Code provides for criminal prosecution or the imposition of civil penalties, or both, against those persons responsible for such failings.

The following analysis suggests that the LAUSD was first made aware that the site of the Belmont Learning Complex (BLC) had toxic problems as early as 1989. Despite this knowledge, the Department of Toxic Substances Control has determined the LAUSD failed to "adequately characterize" the BLC site despite these known problems. In addition, the LAUSD may not have followed applicable regulations by seeking State approval of the BLC site prior to ensuring that the wastes have been removed. Further,

Quality Act (CEQA) guidelines as well as many aspects of the California Code of Regulations that govern the CEQA process.

While the BLC is perhaps the most expensive high school in history, with a projected price of at least two hundred million dollars, it is arguable that this price will drastically increase in the near future. The cost of groundwater remediation alone may reach into the tens of millions of dollars. Not only is there a possibility that the BLC project never was properly assessed, the fact that it is all but built may increase the complexity and cost of the final remediation price.

The following analysis is focused on just one of the eight sites now known to be toxically compromised, the BLC, However, the scope of this issue may extend to the other seven projects as well.

Note: All boldface that appears in quoted sections was added as emphasis.

## BACKGROUND SUMMARY

The Joint Legislative Audit Committee (JLAC) held a hearing in June 1998 to hear testimony regarding the unique difficulties confronted by school districts when building public schools in congested urban settings. The Committee heard testimony concerning one particular new Los Angeles Unified School District (LAUSD) school, Jefferson Middle School (JMS), where toxic soil and groundwater contamination was a component of the project. At the time, the LAUSD testified that the contamination was mitigated and everything was under control. The Committee reported this conclusion as fact in its initial post-hearing report only to subsequently determine the opposite to be the case. Upon the request of the Committee the Department of Toxic Substances Control (DTSC) took another look at JMS and concluded the LAUSD may have been lacking in its initial characterization of the project. Extensive reassessment actions are currently underway at the new fifty million dollar facility to determine the precise extent of the toxic problem.[1]

The Committee followed with a second report that focused on JMS in addition to eight other LAUSD sites with toxic concerns. The DTSC again responded to the Committee's efforts with a new round of investigations. The Chief of the DTSC's Southern California Cleanup Operations Branch A, Hamid Saebfar, requested and received the assistance of this Committee in acquiring the environmental records, characterized at the time by the LAUSD as "complete," for the nine toxic sites identified in JLAC's report TOXIC SCHOOLS IN LOS ANGELES: Weaknesses in the Site Acquisition Process. Mr. Saebfar reported back to this Committee on November 17, 1998, concerning LAUSD sites two, three and four with the JMS site being number one and already under the purview of the DTSC.

[1] Jlac intends to publish an update to the Jefferson Middle School situation in the near future.

It was during the above investigation that the DTSC identified a number of problems at the LAUSD's Belmont Learning Center (BLC) site. The BLC investigation was conducted in two parts as the site was initially designed as a junior high school on an eleven-acre parcel but was subsequently expanded for the BLC project by the addition of twenty-four acres of a twenty-eight acre parcel. The following conclusions reached by the DTSC are based on what the LAUSD characterized as "all the available documents" relating to the BLC project. Those documents supplied by the LAUSD are:

- Phase I Report, dated November 1988;
- Phase II Report, Dated 1989
- Phase I Report, dated May 1990;
- Phase II Report, dated November 1990;
- Report on Subsurface Investigation, dated September 19, 1997;
- A Tank Removal Report, dated September 19, 1997.

These dates establish what information was known to the LAUSD and related agencies throughout the history of this project. As will be discussed below, the dates of the above documents make it virtually impossible for any BLC related agency or individual to argue that their actions were based on insufficient information.

The DTSC offered in their November 1998 Findings the following summary for the eleven-acre site:

> "The Phase II (one part of standard assessment practice) identified thirteen oil wells while the geophysical survey only located ten possible abandoned oil field structures onsite. There appears to be a discrepancy between the number of wells installed vs. the number of wells abandoned onsite. Three Underground Storage Tanks (UST) were located on the Diamond Motors site. The geophysical survey did not locate

drilling waste pits often associated with oil well fields; the survey was only performed on a limited area of the (eleven acre) site."

"The soil gas survey showed that elevated levels of flammable hydrocarbons, at least four times greater than the lower explosive limit (LEL), exist in shallow (20 feet below ground surface) subsurface soils at several areas on the site. Concentrations of 246,621 parts per million (v/v) have been detected at 20 feet below the ground surface (bgs) on the Boylston property. No mitigation documents for methane have been provided for review. **Further investigation must be conducted to determine if trace Volatile Organic Compounds (VOC) are present in the methane gas. This is important because methane gas acts as a carrier for other gasses and can move the VOCs to the surface in greater amounts than is normally seen on sites. This could present both indoor and outdoor risks from the methane and any other components**. The previous soil gas survey conducted on the site did not have detection limits sufficiently low enough to detect some of the more potent carcinogens."

"The soil-sampling program revealed elevated levels of total petroleum hydrocarbons (TPH) exist in subsurface soils at depths from 10 feet to one hundred ten (110) feet bgs at several areas on the site. TPH concentrations of 136,300 parts per million have been detected at 30 feet bgs on the Moret [border zone] property. However, sample analysis focused largely on total petroleum hydrocarbons using EPA method 418.1 and did not reflect the historical use of the site. For example, a thorough characterization of the oil field would locate oil field waste pits and include a complete sample analysis of total metals, VOCs, and semi-volatile organic compounds (SVOC) in the area surrounding the pit. DTSC evaluates risk from total petroleum hydrocarbons by speciating these hazardous components. These analyses have not been conducted on all petroleum-contaminated areas on the site."

The groundwater monitoring survey showed crude oil seeping into two of the three-onsite monitoring wells. The wells were installed on the perimeter of the Park Tract section of the site and may not have been properly located to assess groundwater flow direction/gradient or the extent of contamination. DTSC recommends a complete groundwater investigation that includes analysis for VOCs, SVOCs, and metals.

The DTSC gave the following summary for the twenty-eight acre site:

- "Lario's Tire Service at First/Beaudry had three leaking underground storage tanks which contained fuel. A boring drilled to 40 feet bgs encountered groundwater at 34 feet bgs. A vapor sample collected from the same approximate depth within the boring had PID/FID readings of 1,800 ppm and greater than 1,000, respectively. Benzene was detected at 5,550 ug/m3, 1,3,5,-trimethylbenzene (1,3,5,-TBM) at 2,350 ug/m3 and 1,2,4-TBM at 3,800 ug/m3. **These vapor concentrations could present a potential health risk to future occupants at the site from migration to indoor and outdoor air, particularly since benzene is a known human carcinogen. In addition, a soil sample collected from this boring at 15 feet depth showed benzene at 2.564 mg/kg. Benzene was also detected in thirteen other soil borings.** An additional waste oil tank was suspected on the site; however, only one soil boring was drilled to investigate this area. While TPH was not detected in this boring, the area was not sufficiently investigated to determine if there was a tank and any residual contamination. Because groundwater has been noted at shallow depths and contaminated soil and vapor have been detected at the same approximate depths, further investigation is warranted for both soil and groundwater."
- "The Independent Auto Works at First/Beaudry had a leaking waste oil UST. Upon excavation, the UST was noted to have sludge within the tank, to the height of the hole and discolored soil with an odor in the excavation area. Analyses of soil samples collected from the excavation was limited to petroleum hydrocarbons and did not include total metals, SVOCs, and VOCs. Further investigation is therefore warranted to define the vertical and lateral extent of the contamination."

- "At the Toluca/Colton oil field it appears that soil vapor analyses were conducted at three deep (20-25 feet) and three shallow points (2-3 bgs) to assess the concentrations and extent of subsurface gaseous hydrocarbons. The vapor survey indicated that elevated levels of methane exist (up to 26,000 ug/l). However, the characterization of the oil field is inadequate and further investigation is warranted."

The DTSC then made the following overall analysis:

**"CONCLUSION AND RECOMMENDATIONS"**

"Based on our review of the environmental documents, DTSC has concluded that the site has not been adequately characterized. The soil vapor, soil and groundwater investigations were incomplete. Other than the First/ Beaudry UST excavations, there is no other information on other remedial actions. Carcinogens, such as benzene, have been found on the site, potentially hazardous conditions from methane accumulation have been identified, and other hazardous chemicals, such as PAHs, are strongly suspected to be present."

It is clear that there are serious toxic problems at the BLC site. Approval for construction of a school on this site without complete assessment followed by a detailed remediation plan is troubling.

Construction of the BLC was approximately half-complete when the above DTSC report was released in November 1998. It is arguable that had it not been for the efforts of this Committee, the DTSC would never have conducted its BLC audit and the LAUSD would have finished constructing the BLC on toxically compromised land. The DTSC expects full assessment of the BLC site to take approximately a year to complete. Only after assessment can remediation be planned. The cost of remediation may reach staggering proportions. Startup costs for groundwater remediation alone is expected to range

somewhere between ten and twenty million dollars. The fact that the footings and many of the concrete slabs have already been poured in areas of toxic concern is expected to drastically increase the cost and time needed to satisfactorily remediate this site so it is suitable for human occupancy.

## LEGAL ENVIRONMENTAL REQUIREMENTS

There are a host of laws and processes built into the system of land acquisition, funding, and construction that are designed to prevent the kinds of hazardous substance problems found at the BLC site from arising at new school construction projects. Some of the questions begged by the BLC story are:

- How did the LAUSD apparently circumvent the systems and laws that were designed to prevent schools from being built on toxic sites?
- Why were the initial environmental assessments so deficient?
- Were these deficiencies a product of an inattentive contractor or did the LAUSD direct the contractor to limit their efforts?
- When were the problems identified by the DTSC first suspected by LAUSD staff?
- Who is responsible for each of the failings that allowed the above to happen?

### California Law

There are many laws and codes that govern where a new public school can be built in California:

- Education Code
- Health and Safety Code
- California Code of Regulations
- California Environmental Quality Act
- Public Resources Code
- Government Code

Some of the above codes specifically address public school construction issues.

**Education Code and Related Provisions of the Health and Safety Code**

Section 17211 to 17215, inclusive, and Section 17268 of the Education Code contains provisions given the acquisition of property for schoolsites and the construction of new school buildings or those sites. The provisions where the language prohibiting school construction on toxic land is most striking is Section 17213 of the Education Code, which states that the governing board of a school district may not approve a project for school construction involving the acquisition of school site by the district if the property in question is:

> "17213(a)(1) The site of a current or former hazardous waste disposal site or solid waste disposal site unless, if the site was a former solid waste disposal site, the governing board of the school district concludes that the wastes have been removed.[2]
>
> * * * "

There has been some effort to misinterpret that provision. Some have argued that the reference to "hazardous waste" in the above provision only refers to some narrow range of contaminants. However, paragraph (4) of subdivision (d) of Section 17213 of the Education Code directs one to find the definition of "hazardous waste" in Section 25117 of the Health and Safety Code. Section 25141 the Health and Safety Code further states:

> "25141.(a) The department [DTSC] shall develop and adopt by regulation criteria and guidelines for the identification of hazardous wastes and extremely hazardous wastes.
>
> "(b) The criteria and guidelines adopted by the department pursuant to subdivision (a) shall identify waste or combinations of waste, that may do either of the following, as hazardous waste because of its quantity, concentration, or physical, chemical, or infectious characteristics":

"(1) Cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."

"(2) Pose a substantial present or potential hazard to human health or the environment, due to factors including, but not limited to, carcinogenicity, acute toxicity, chronic toxicity, bioaccumulative properties, or persistence in the environment, when improperly treated, stored, transported, or disposed of, or otherwise managed.

* * * "

Further, some might argue that Section 17213 of the Education Code only refers to sites that are operated as some type of formal waste repository used solely for the purpose of accepting waste. However, that section goes on to define "hazardous waste disposal site" by directing one to Section 25114 of the Health and Safety Code (see para. (5) subd. (d), Sec. 17213). Section 25114 of the Health and Safety Code defines "disposal site" to mean "the location where any final deposition of hazardous waste occurs."[3] Considering the dates of the above documents used by the DTSC to audit the extent of contamination at the BLC site, it appears that the LAUSD may have been aware of the hazards on the BLC site years before construction began. Furthermore, it appears that LAUSD officials may not have properly followed applicable regulations regarding hazardous sites proposed for school construction.

Health and Safety Code

The Health and Safety Code requires under penalty of prosecution that all districts make application to the DTSC whenever toxic contamination is *suspected* at a prospective schoolsite. According to Section 25221of that code:

"25221.(a) Any person as owner, lessor, or lessee who (1) knows, or has probable cause to believe, that a significant disposal of hazardous waste has occurred on,

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[2] (Stats.1996, c. 1010 § 2, operative January 1, 1998.
[3] (Amended by Stats. 1977, Ch. 1039.)

under, or into the land which he or she owns or leases or that the land is within 2,000 feet of a significant disposal of hazardous waste, and (2) intends to construct or allow the construction on that land of a building or structure to be used for a purpose which is described in subdivision (b) of Section 25232 within one year, shall apply to the department [DTSC] prior to construction for a determination as to whether the land should be designated a hazardous waste property or a border zone property pursuant to Section 25229.

* * * "

In the context of that provision of Section 25221, "disposal" is defined by Subdivision (a) of Section 25113 as either of the following:

> "25113.(a)(1) The discharge, deposit, injection, dumping, spilling, leaking, or placing of **any** waste so that the waste or any constituent of the waste is or may be emitted into the air or discharged into or on any land or waters, including groundwaters, or may otherwise enter the environment.
>
> (2) The abandonment of any waste."

Subdivision 25232. (b) of Section 25232 includes in its definition of applicable structures:

* * * "

> "(b) Except as provided in subdivision (c) of this section, after the director [Director of Toxic Substances Control] has provided notice in compliance with Section 25222 and a hearing or decision regarding specific land is pending, or after a hearing has been conducted and a decision has been made pursuant to Section 25229 that land is a border zone property (proximate to Hazardous Waste Disposal; see Sec. 25117.4), then none of the following shall occur on the land without a specific variance approved in writing by the department [DTSC] for the land use and land in question:

(1) Construction or placement of a building or structure on the land which is intended for use as any of the following, or the new use of an existing structure for the purpose of serving as any of the following:

* * * "

(C) A school for persons under 21 years of age. [8]

* * * "

If a California public agency, such as the LAUSD, fails to abide by this code, subdivision (a) of Section 25236 provides, in relevant part, as follows:

"2536.(a) Prior to, or simultaneously with, utilizing the provisions of this article [Art. 11 (commencing with Sec. 25220), ch. 6.5, Div. 20, pertaining to Hazardous Waste Disposal Land Use], **the department (DTSC) shall diligently pursue feasible civil and criminal actions against any operator or other responsible party who violates any provision of this chapter** or Chapter 6.8 (commencing with Section 25300) and the regulations promulgated under those chapters.

* * * "

According to the DTSC, the LAUSD has never applied to DTSC prior to construction of a new school for a determination as to whether the land should be designated a hazardous waste property or a border zone property.

The LAUSD, however, is claiming that it performed its due diligence duty by way of the Notice of Preparation which will be discussed in detail in the following section on the California Environmental Quality Act (Div. 13 (commencing with Sec. 21000), P.R.C.) pertaining to environmental impact report (EIR) requirements. The problem here is that the LAUSD apparently failed to satisfy the basic requirements of the notice of preparation (NOP) process, possibly resulting in the necessary information never reaching the appropriate state agency, in this case the DTSC.

To date, this Committee is aware of eight new LAUSD school construction projects where toxins were suspected prior to purchase of the land yet the LAUSD may have failed to notify the DTSC in accordance with the Section 25221 of the Health and Safety Code[4]. Again, notice the dates of the environmental documents used by the DTSC for the purpose of their audit. Two of the assessment reports, 1989 and 1990, were performed on the 28- acre parcel, the bulk of which was not purchased until 1994. It is difficult to understand how the LAUSD apparently failed to comply with the Health and Safety Code's requirement when all this factual data was available.

Considering the relationship between what the LAUSD knew about the BLC and the law discussed above, it appears that the environmental problems facing the LAUSD today might not exist if the LAUSD had adhered to the Health and Safety Code hazardous waste requirements. Had they adhered to those requirements, the DTSC would have been involved from the beginning of the project and would have been expected to have brought environmental issues under control before construction began.

California Environmental Quality Act

The California Environmental Quality Act (CEQA) requires public agency decisionmakers to document and consider the environmental implications of their actions (see for example, subds. (f) and (g), Sec. 21001, P.R.C., 14 Cal Code Regs Secs. 15001 (a) (1) and 15003 (a)). While CEQA might generally be thought of as an effort to prevent the unnecessary ruination of California's natural environment, CEQA also addresses the

[4] "Toxic School Sites In Los Angeles: Weakness In The Acquisition Process" JLAC Report, July, 1998.

environment's impact on health and safety issues (see subd. (d), Sec. 21000, P.R.C.). This notion of nature impacting humanity is not limited to quality-of-life issues but also addresses the potential impact of contamination on human health (see subd. (f), Sec. 21000, P.R.C. relating to waste disposal and pollution control). It is this latter concern for the possible impact of toxic contamination on human health that will guide the following analysis.

There are two parallel sets of rules governing CEQA. The legislative policy provisions of CEQA are set forth in Chapter 1 (commencing with Sec. 21000) of Division 13 of the Public Resources Code. It is in that chapter that the obligatory nature of CEQA is detailed. CEQA defines the public agencies subject to it to include "any state agency, board, or commission, any county, city and county, city, regional agency, **public district**, redevelopment agency, or other political subdivision (Sec. 21063, P.R.C.)." Therefore, the LAUSD, as a "public district," must abide by the requirements of CEQA.

There are also CEQA regulations found in Title 14 of the California Code of Regulations, entitled "Guidelines for Implementation of the California Environmental Quality Act (hereafter "guidelines" or "CEQA guidelines").[5]" While these rules governing the implementation of CEQA are termed "guidelines," adhering to these rules is mandatory.

One dominant theme of CEQA is that the guidelines be integrated throughout the planning of any new applicable public construction project. Section 21003 of the Public Resources Code makes this notion of integration clear when it states:

> "21003. The Legislature further finds and declares that it is the policy of the state that:
>
> > "(a) Local agencies integrate the requirements of this division [CEQA] with planning and environmental review procedures otherwise

[5] Commencing with Section 15000.

required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively.

* * * "

This notion of complete integration, that CEQA should be part of any project from its inception, is a dynamic whose importance is also stressed by the courts:

". . .[T]he underlying purpose of CEQA [is] to 'attempt to influence the decision-making process of state agencies at a point where genuine flexibiliy remains. . ." (Mount Sutro Defense Committee v. Regents of University of California, 77 Cal.App.3d 20, 34).[6]

A study conducted after the approval of a project will inevitably have a diminished influence on decision-making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA. (see No Oil, Inc. v. City of Los Angeles, 13 Cal.3d 68, 81, and Environmental Defense Fund, Inc. v. Coastside County Water Dist., 27 Cal.App.3d 695, 706).

It will be important to keep the above notion of timing in mind while following the BLC story. It is arguable that the LAUSD's remediation process is an after-the-fact approach in conflict with guiding regulatory principles.

Another component of CEQA that supports the above notion of full integration is the requirement that every public agency, such as the LAUSD, must formally adopt its own objectives, criteria, and procedures. According to Section 21082 of the Public Resources Code:

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[6] Id. At p. 35; No Oil, Inc. v. City of Los Angeles, 13 Cal.3d 68, 81; Environmental Defense Fund, Inc. v. Coastside County Water Dist. (1972) 27 Cal.App.3d 695, 706.

"21082. All public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports and negative declarations pursuant to this division. A school district, or any other district, whose boundaries are coterminous with a city, county, or city and county, may utilize the objectives, criteria, and procedures of the city, county, or city and county, as may be applicable, in which case, the school district or other district need not adopt objectives, criteria, and procedures of its own. The objectives, criteria, and procedures shall be consistent with the provisions of this division [CEQA] and with the guidelines adopted by the Secretary of the Resources Agency pursuant to Section 21083."

The LAUSD did adopt procedures for implementing CEQA in 1974. This protocol defines what constitutes a "Significant Environmental Impact" as:

"(1) Impacts which have the potential to degrade the quality of the environment or curtail the range of the environment.

(2) Impacts which achieve short-term, to the disadvantage of the long-term, environmental goals. A short-term impact on the environment is one which occurs in a relatively brief, definitive period of time while the long - term impacts will endure well into the future.

(3) Impacts for a project, which are individually limited, but cumulatively considerable. A project may affect two or more separate resources where the impact on each resource is relatively small. If the effect of the total of those impacts on the environment is significant, an EIR must be prepared. This mandatory finding of significance does not apply to two or more separate projects where the impact of each is insignificant.

(4) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly."

While only the last paragraph of the above specifically refers to human impact, it is arguable that the other three paragraphs are applicable as well. Since "environmental impact" can reasonably be argued to include adverse effects on humans, it further appears arguable that impacts that "have the potential to degrade the quality of the environment" and are "to the disadvantage of the long term" and "cumulatively considerable" all support those toxic concerns that will ultimately "cause substantial adverse effects on human beings." Considering what the LAUSD may have known at the time the series of CEQA documents discussed below were approved, the District may not have properly followed regulations.

## CEQA

There are three substantial players designated to facilitate the CEQA process:

(1) Lead Agency

(2) Responsible Agency

(3) Trustee Agency

Lead Agency

The *lead agency* is defined by section 15367 of the CEQA Guidelines to mean:

> "15367. . . [t]he public agency which has the principal responsibility for carrying out or approving a project. The lead agency will decide whether an EIR or negative declaration will be required for the project and will cause the document to be prepared. . ."[7]

In the case of the BLC, the lead agency is the LAUSD.

Responsible Agency

The *responsible agency* is defined by Section 21069 of the Public Resources to mean "a public agency, other than the lead agency, which has responsibility for carrying out or approving a project." In the case of the BLC, the responsible agency is the City of Los Angeles.[8] Those requirements imposed on the responsible agency are neither passive nor few. Subsection (a) of Section 15096 of the guidelines specifies these requirements as follows:

> "15096.(a) General. A responsible agency complies with CEQA by considering the EIR or negative declaration prepared by the lead agency and by reaching its

[7] See also Section 21067 of the Public Resources Code. A complete discussion of EIRs and Negative Declarations will follow.

[8] Letter from C. Howe to F. Bennett, October 20, 1993

own conclusions on whether and how to approve the project involved. This section identifies the special duties a public agency will have when acting as a responsible agency."

That section of the guidelines goes on to describe in detail the duties of a responsible agency, in this case the City of Los Angeles:

> "(b) Response to Consultation. A responsible agency shall respond to consultation by the lead agency in order to assist the lead agency in preparing adequate environmental documents for the project. **By this means, the responsible agency will ensure that the documents it will use will comply with CEQA**.
>
> * * *
>
> "(c) Meetings. The responsible agency shall designate employees or representatives to attend meetings requested by the lead agency to discuss the scope and content of the EIR.
>
> "(d) Comments on Draft EIR's and Negative Declarations. A responsible agency should review and comment on draft EIRs and negative declarations for projects which the responsible **agency would later be asked to approve**. Comments should focus on any shortcomings in the EIR, the appropriateness of using a negative declaration, or on additional alternatives or mitigation measures, which the EIR should include.
>
> * * *
>
> "(e) Decisions on adequacy of EIR or negative declaration. If a responsible agency believes that the final EIR or negative declaration prepared by the lead agency is not adequate for use by the responsible agency, the responsible agency must either:

(1) Take the issue to court within 30 days after the lead agency files a notice of determination;
(2) Be deemed to have waived any objection to the adequacy of the EIR or negative declaration;
(3) Prepare a subsequent EIR if permissible under Section 15162; # or
(4) # Assume the lead agency role as provided in Section 15052(a)(3).

"(f) Consider the EIR or Negative Declaration. Prior to reaching a decision on the project, the responsible agency must consider the environmental effects of the project as shown in the EIR or negative declaration. A subsequent or supplemental EIR can be prepared only as provided in Sections 15162 or 15163.

* * *

It is arguable, after considering the following analysis, that the City of Los Angeles failed in its responsibilities as the BLC's *responsible agency* by allowing a final EIR to be approved by the LAUSD without further comment (see CEQA section below).

The City of Los Angeles might argue that they felt somewhat intimidated by LAUSD staff. Such a position is no surprise when memos from the LAUSD's lawyers are studied. In one instance, a memo from LAUSD consultant attorney David Cartwright to LAUSD CEQA officer, Robert Niccum, discusses comments made by the City of Los Angeles by stating:

"The City's letter is an amalgamation of erroneous statements and confusion about the project and CEQA in general. The City must understand that it is not the lead agency here and whether it has accepted or certified previous traffic

studies is not particularly relevant to the District. The fact that such studies exist and can be reviewed by the District as part of its deliberative purposes is relevant and does support the District's CEQA position in using the negative declaration route. Some of the City's questions seem of the informational variety and can be answered accordingly. The City's reference to its own variances and conditional use permit requirements can be handled by the District opting out of the City's zoning (as permitted by the Government Code)."[9]

It would appear that Mr. Cartwright views the *Lead Agency v. Responsible Agency* situation as the latter serving in a subordinate role to the former without recourse. However, this appears to contradict the above guidelines. Rather than the City of Los Angeles having no say in the above matter, the law plainly gives the responsible agency a broad spectrum of power, including even taking over the lead agency's role, as noted in paragraph (4) of subdivision (e) of Section 15096 of the guidelines.

Trustee Agency

The *trustee agency* is defined by Section 15386 of the CEQA Guidelines, to mean "a state agency having jurisdiction by law over natural resources affected by a project which are held in trust for the people of the State of California . . . " Those trustee agencies include all of the following:

(a) The Department of Fish and Game.
(b) The State Lands Commission.
(c) The Department of Parks and Recreation.
(d) The University of California.
[Sec. 15386, Guidelines]

[9] Letter to R. Niccum from D. Cartwright dated October 26, 1993

Since each of the above agencies' jurisdictions is limited to the preservation of natural resources, this provision of the guidelines is not applicable to the present discussion, that is, neither the LAUSD nor the City Of Los Angeles is a "trustee agency."

## THE CEQA PROCESS

The CEQA process is comprised of the following ten steps:

1) Initial Study
2) Negative Declaration
3) Notice of Preparation for EIR
4) Draft EIR
5) Public Review of Negative Declaration or Draft EIR
6) Response to Comments on Draft EIR
7) Certification of Final EIR
8) Findings
9) Mitigation reporting or Monitoring Program
10) Statement of Overriding Considerations

Initial Study

Section 15365 of the CEQA Guidelines defines *initial study* to mean "a preliminary analysis prepared by the lead agency to determine whether an EIR or a negative declaration must be prepared or to identify the significant environmental effects to be analyzed in an EIR . . ."

It is in this first step in the CEQA process where a fundamental decision is made that will influence the project from inception to completion. In general, a *negative declaration* is prepared when it is determined that there is no substantial evidence that this project will result in a significant impact on the environment, including any adverse impact on human health and safety. In contrast, an EIR is required to be prepared when it is determined, following the initial study, that there is substantial evidence that the project may cause a significant impact on the environment (see Sec. 15065, Guidelines).

The initial study is facilitated by means of a checklist as described in Paragraph (3) of subdivision (d) of Section 15063 of the guidelines. One of the sixteen groups of

questions contained in the LAUSD's checklist for the BLC project is titled "Hazards." The two following questions, followed by their respective LAUSD responses, concern issues of toxic contamination:

"CEQA Question: a) Would the proposal involve a risk of accidental explosion or release of hazardous substances (including, but not limited to, oil, pesticides, chemicals, or radiation)?

LAUSD Answer: The project site is located atop a historical oil field which represents a potential for methane gas seepage and, possibly, surface oil leaks from the abandoned 19th century wells. The project provides for the retention of active producing wells to relieve gas pressure and includes construction of venting systems as appropriate. These and other measures, which will reduce the risk of accident to a less than significant level, will be further discussed in the EIR.

CEQA Question: d) Would the proposal involve exposure of people to existing sources of potential health hazards?

LAUSD Answer: Previous oil field operations and former commercial uses, such as gas service stations, resulted in some soils contamination at certain portions of the site. These concerns and mitigation measures developed to reduce potential hazards will be discussed in the EIR."

Notice the tense of the phrase "mitigation measures developed." Does this not imply that mitigation measures have already been developed? Further, does not this *development of plans* imply that there exists a base of knowledge from which all these plans were drawn? Would not such a base of knowledge reasonably imply proper assessment of the site? Yet we know from the DTSC's own report that the site may not have been properly assessed.

It appears that this initial study contains inaccuracies. All of which begs the question of whether such statements constitute an intentional misrepresentation of fact. Evidence suggests that the initial study made the LAUSD aware of hazards at the site, yet the appropriate state agencies may have not have been informed.

The last question on the CEQA checklist comes under the banner of "Mandatory Findings of Significance." The last question and answer in this section is:

"CEQA Question: Does the project have environmental effects, which will cause substantial adverse effects on human beings, either directly or indirectly?

LAUSD Answer: The proposed project will provide modern high school facilities, affordable housing, and supporting community commercial retail services. These are common urban uses that generally do not create substantial adverse effects on people. The project will result in a beneficial effect of remediating contaminated soils in the site. The project will use available standard engineering techniques to reduce effects of previous oil extraction activities, and noise, traffic, air pollution emissions, and other impacts typical of urban development."[10]

While it should be readily apparent from the above that the LAUSD had cause to know of probable contamination at the BLC site, knowledge of these hazards significantly predates this initial study. Prior to the LAUSD's decision to build the BLC, a smaller school project was planned on an eleven-acre portion of the eventual 35-acre site. Concerning "Hazards," this 1993 initial study states under the heading of "Human Health:"

[10] Initial Study: Environmental Checklist Form, prepared by Cotton/Beland/Associates, Inc.,for the LAUSD, December 21, 1995

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[10] Initial Study: Environmental Checklist Form, prepared by Cotton/Beland/Associates, Inc.,for the LAUSD, December 21, 1995

"(1) The LAUSD shall conduct or cause to conduct a Phase II Site Assessment to determine the presence and extent of environmental contamination associated with the site.

(1) The existing contamination shall be remediated prior to construction of the project in conference with federal, state, and local requirements and regulations.

(2) The existing oil wells shall be abandoned in conformance with requirements and guidelines of the Division of Oil, Gas, and Geothermal Resources prior to construction of the project. Some operating wells shall be retained if and as recommended by the Division of Oil, Gas, and Geothermal Resources to relieve pressure in the field.

(3) The LAUSD site design/engineering design contract documents shall include the necessary measures required to prevent buildup of methane gas under the structures and pavement. These measures may include the provision of a venting system, or other measures. The methane control system shall be designed in conformance with the City of Los Angeles Memorandum of General Distribution #92 requirements."[11]

This above 1993 Initial Study is not the first evidence of toxic concerns at a BLC related site. Putting aside the issue of when the LAUSD first *suspected* toxic problems at what is now the BLC site, as early as January of 1989, a McLaren Environmental Engineering Subsurface Soil Investigation report concluded that:

- "Three soil borings (SB-1, SB-2, and SB-4) around the three underground gasoline tanks were found to contain TPH as gasoline. Soil boring SB-1, located on the south side of the tank nest next to the intersection of First Street and Beaudry Avenue contain the highest TPH concentration of 900 ppm at the

[11] "Belmont New Senior High School No. 1, Final Mitigated Negative Declaration and Initial Study," September 1993, prepared by cotton/Belnad/Associates, Inc., prepared for the LAUSD

five foot depth. TPH was found in soil boring SB-2 at 400 ppm at 10 feet and in soil boring SB-4 at 100 ppm at 5 –foot depth.

- Benzene, toluene, xylene, and ethylbenzene (BTX) compounds were detected in the 5 and 15 foot samples of soil boring SB-1 and the 10, 15, and 5 foot depths of soil borings SB-2, SB-3, and SB-4 respectively. BTX compounds ranged from approximately 1 ppm to 150 ppm in the upper samples analyzed from each boring.
- Xylene was detected in the 40-foot sample of soil boring SB-1.
- TPH was detected in the 10-foot sample at 970 ppm and the 20-foot sample at 5 ppm from soil boring SB-9. TPH was also detected in the 20-foot sample at 170 ppm from soil boring SB-11 at the classifier.[12]

It was this McLaren report that the LAUSD used in the creation of its own EIR a few years later.[13] In 1990, another assessment of the BLC site was conducted by ABB Environmental for the LAUSD. This study states under the banner "CONCLUSIONS AND RECOMMENDATIONS" that:

> "Based on the physical inspection of the site and structures, the historical investigation, and searches of regulatory and other agency files, ABB Environmental offers the following conclusions regarding potential environmental problems at the Belmont site:
>
> "(1) Location of the site within the Los Angeles oilfield and documented oil extraction activities on the site indicate a potential for environmental problems associated with **explosive/toxic gases** and subsurface soils contamination. Such problems appear most likely to occur in Blocks 12 and 13 based on locations of abandoned oil wells and the boundaries of the oil field. Although

[12] "Subsurface Soil Investigation for ht Pacific Rim Plaza Property in Los Angeles, California: January 9, 1989." By McLaren Environmental Engineering, pgs. 8-13

no related problems have been recorded at the subject site, nearby properties have experienced crude seepage, and significant methane problems are occurring in at least one geologically and historically similar area of Los Angeles.

"(2) The two fuel tanks and one hydraulic lift cylinder at 1100 West Temple Street installed in the late 1940's could potentially have leaked, contaminating subsurface soil and groundwater.

"(3) The paved surfaces of the hazardous waste/drum and paint storage areas at 1100 West Temple Street exhibit moderate to heavy staining. Solvents and/or paints could have contaminated underlying soils in this area.[14]

For the LAUSD to say that they were unaware of toxic suspicions at the BLC site until only 1998 seems counter-intuitive.

Despite their apparent knowledge of contamination of the BLC site, the LAUSD apparently used the Initial Study process to conclude that a BLC EIR was not necessary and that a negative declaration should be prepared.

At this point in the CEQA process the Lead Agency, in this case the LAUSD, must decide between the preparation of either a negative declaration or an environmental impact report (EIR). It should be clear from the following that a negative declaration is bureaucratically preferable to an EIR due the amount of effort and expense that an EIR requires and the amount of external review any lead agency must endure whenever conducting an EIR. The key to this decision is whether or not a project contains any significant adverse impacts on the environment. Keeping distance between a project and the possibility of an EIR requires the lead agency to argue that the project does not involve a significant negative impact on the environment. Section 21080 of the Public

[13] The FEIR cites the Belmont New Junior High School No. 1 Final Environmental Impact Report, SCH# 90010277, LAUSD, September 1990. This EIR was in part based on the 1989 McLaren Report.

Resources Code, in part, explains the parameters of the negative declaration vs. EIR decision:

* * *

"21082.(c) If a lead agency determines that a proposed project, not otherwise exempt from this division, would not have a significant effect on the environment, the lead agency shall adopt a negative declaration to that effect. The negative declaration shall be prepared for the proposed project in either of the following circumstances:

(1) There is **no substantial evidence**, in light of the whole record before the lead agency, that the project **may** have a significant effect on the environment.

(2) An initial study identifies potentially significant effects on the environment, but (A) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration an initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (B) there is no substantial evidence, in light of the whole record before the lead agency, that the project, as revised, may have a significant effect on the environment.

"(d) If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared.

"(e) (1) For the purposes of this section and this division, substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.

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[14] "Report of Phase I Site Assessment Including Phase II Workplan for Belmont Junior High No. 1" prepared by: ABB Environmental Services, Inc., May 22, 1990.

(2)Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

* * *

The relationship between a "significant effect" and "potentially significant effect" on the environment is an important one. If a lead agency can argue that an effect is only *potential* and that this potential will be eliminated by remediation, then the lead agency can rationalize that the effect is less than substantive. If all concerns with a project can be labeled *less than significant*, the door for a negative declaration is opened. On the other hand, if a lead agency initially identifies an effect as *significant* and then argues that this significant impact can be reduced to insignificance by remediation, then, according to subdivision (d) of Section 21080 of the Public Resources Code, an EIR must be prepared regardless of mitigation possibilities. How the Initial Study handles the initial labels of environmental significance may determine whether or not a lead agency must prepare an EIR.

An important dynamic of deciding between a negative declaration and an EIR is the notion of *fair argument*. If only one portion of a project indicates that significant impacts may occur, an EIR must be prepared. The notion of *fair argument* establishes a minimal standard for requiring an EIR. The California Supreme Court decided this notion of minimal standard in No Oil, Inc. v. City of Los Angeles. Supra wherein it stated at pages 84 and 85:

"As stated by Judge Friendly, discussing the federal act, "It is not readily conceivable that Congress meant to allow agencies to avoid this central requirement by reading 'significant' to mean only 'important,' 'momentous,' or the like. One of the purposes of the impact statement is to insure that the relevant environmental data are before the agency and considered by it prior to the decision to commit Federal resources to the project; the statute must not be construed so as

to allow the agency to make its decision in a doubtful case without the relevant data or a detailed study of it.

"In limiting the use of EIRs to projects which may have an 'important' or 'momentous' effect, the trial court adopted a test which will necessarily bar preparation of an EIR in those close and doubtful cases to which Judge Friendly referred, and will, to that extent, defeat the Legislature's objective of ensuring that environmental protection serve as the guiding criterion in agency decisions. (Pub. Resources Code, Section 21001, subd. (d).) Indeed, the trial court test of 'significant impact' imposes a far higher threshold barrier to the preparation of an EIR than any suggested in state or federal guidelines or in any reported decision; its interpretation affords not the fullest, but the least possible protection to the environment within the statutory language.

* * *

"Thus we conclude, as did the court in County of Inyo v. Yorty that an agency should prepare an EIR whenever it perceives 'some substantial evidence that the project "may have a significant effect' environmentally." ( 32 Cal.App.3d at p. 809.) As stated by Judge J. Skelly Wright in Students Challenging Reg. Agency v. United States (D.D.C. 1972) 346 F. Supp. 189, 201, an environmental impact report should be prepared "whenever the action arguably will have an adverse environmental impact."

Arguably, contamination of the BLC site with high levels of benzene, toluene, xylene, and ethylbenzene, as evidenced by the 1989 McLaren report, clearly satisfies any reasonable notion of "not trivial" and might even be described as "momentous." Regardless of this observation, the LAUSD attempted to file a negative declaration and in so doing argue that there was no "fair argument" that adverse effects may result from building on the BLC site.

Negative Declaration

Section 15070 of the CEQA guidelines, requires that a *negative declaration* or mitigated declaration be prepared when:

* * *

> "1570(a) The initial study shows that there is no substantial evidence, in light of the whole record before the agency, that the project may have a significant effect on the environment, or
>
> "(b) The initial study identifies potentially significant effects, but:
>
> (1) Revisions in the project plans or proposals made by or agreed to by the applicant before a proposed mitigated negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and
>
> (2) There is no substantial evidence, in light of the whole record before the agency, that the project as revised may have a significant effect on the environment."

By the fall of 1993, the LAUSD was attempting to have a negative declaration approved for what was then referred to as the Belmont New Junior High School located on the eleven-acre site as described in the above McLaren and ABB reports. Had the LAUSD succeeded in its efforts, their negative declaration would have effectively ended the environmental review process for the BLC site altogether. Since an EIR had already been approved for the eleven-acre portion of the site, a negative declaration for the twenty-four acre site would have eliminated the need for a further CEQA compliance, including an EIR.

The LAUSD failed in its effort to argue that all environmental impacts at the BLC site were less-than-significant. However, the CEQA form necessary for filing a negative declaration is, itself, of interest. The form is a checklist of various aspects of the negative declaration CEQA process and closes with the following:

"We certify under penalty of perjury that the Governing Board has reviewed this form and supporting documents, that the contents properly set forth the request of the District for funding under Chapter 22 [commencing with Section 17700; now ch. 12 (commencing with Sec. 17000)], Part 10, of the Education Code, and that the information contained herein is true and accurate to the best of our knowledge and belief. We are aware of Section [17041.2] of the Education Code and [Section] 12560 of the Government Code, which provide for penalties when information is erroneously self-certified."

The individual that signed the above form is the LAUSD's Director of Planning and Development, Dominic Shambra. The penalties referenced in the above are as follows:

**Education Code § 17041.2:**

"(a) The State Allocation Board shall conduct random audits of the information certified by self-certifying districts pursuant to this chapter [Ch. #12 (commencing with Sec. 17000)], except as to any determinations that are made under subdivision (d) of Section 17041.1 or that are subject to audit by the State Department of Education pursuant to Section 17024, using generally accepted auditing principles, at any time to ensure compliance with the law.

"(b) If any information submitted by a self-certifying district in its certification of funding eligibility for any project is found by the board to contain any material inaccuracy, any building area constructed as a result, in excess of the building area to which the district was entitled for purposes of that project, shall be included in the calculation of the area of adequate school construction for the purposes of all subsequent project applications by the district under this chapter. In addition, the board shall impose both of the following penalties:

"(1) Pursuant to a repayment schedule approved by the board, the district shall repay to the board of no more than five years, for deposit in the State School Building Lease-Purchase Fund, an amount equal to the amount of project funding allocated under this chapter to construct that excess building area, together with interest at the rate paid on moneys in the Pooled Money Investment Account or at the highest rate of interest for the most recent issue of state general obligation bonds as established pursuant to Chapter 4 (commencing with Section 16720) of Part 3 of Division 4 of Title 2 of the Government Code, whichever is greater. The amount of any repayment owing under this paragraph for any fiscal year, which is not repaid otherwise by the district, shall be withheld by the board from any project funding that otherwise would be allocated to that district under this chapter in that fiscal year. As to any repayment obligation remaining for that fiscal year, the board shall notify the Superintendent of Public Instruction, who shall withhold the amount of that remaining obligation from the apportionment's to be made to the district from the State School Fund in that fiscal year.

"(2)The information that otherwise may be certified under this chapter by a self-certifying district shall be made by the board under any subsequent applications for project funding, rather than by the applicant district, for a period of up to five years following the date of the finding of a material inaccuracy, or until the district's repayment of the entire amount owing under paragraph (1), whichever occurs later.

* * * "

It would appear possible that Mr. Shambra's signature on the CEQA negative declaration form, may open the door to a State Allocation Board review of the LAUSD.

**Government Code § 12560**: "The Attorney General has direct supervision over the sheriffs of the several counties of the State, and may require of them written

reports concerning the investigation, detection and punishment of crime in their respective jurisdictions. Whenever he deems it necessary in the public interest he shall direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff, and he may direct the service of subpoenas, warrants of arrest, or other processes of court in connection therewith."

The LAUSD argued under the banner of "Determination" in its 1993 negative declaration that:

> "The Los Angeles Unified School District has determined that the proposed project will not result in significant adverse impacts to the environment. The documentation supporting this determination is discussed in the Initial Study prepared for this project (see attached). The following mitigation measures have been included to avoid **potential** significant effects."

Beyond the issues of whether or not the known toxic impacts constitute something more than *possible*, there is a further problem this report defines as "we'll fix it later—somehow." It is here that the LAUSD apparently evidences a second flaw to its approach. It is one thing to argue that a significant impact is possible, but quite another to argue exactly how that possibility will be remediated. To argue that a possible significant effect on the environment is no longer possible requires something more than simply saying so. Remember the wording of Paragraph (1) if sub division (e) of Section 21080 of the Public Resources Code, quoted above, in which it is stated that the substantial evidence required to argue an impact is not substantial is defined as "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." Furthermore, paragraph (2) of subdivision (e) of Section 21080, also quoted above, defines what substantial evidence is not as "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous." It is clear that those provisions are very specific about what does and does **not** constitute those project dynamics that are eligible for a negative

declaration. The environmental assessment reports in the hands of the LAUSD at the time they attempted to certify a negative declaration would appear to prohibit the LAUSD's use of a negative declaration as a means of avoiding doing an EIR.

Concern over a lead agency avoiding its responsibilities further compounded when put in the context of toxic contamination. Rather than an exact science, toxic remediation cannot be adequately discussed until an adequate assessment has been conducted. In the case of the BLC, the LAUSD may not have conducted an adequate assessment.

Furthermore, the courts have ruled that negative declarations cannot be based on the presumed success of yet -to -be determined mitigation measures. In *Sundstrom v. County of Mendocino*, 202 Cal.App3d 296, Court of Appeal found that the lead agency had violated CEQA by approving the project without first resolving **uncertainties regarding the projects potential to cause significant environmental impacts**. The initial study was deficient for several reasons. It used a checklist less extensive than the one proposed by the CEQA guidelines, and thus "displayed only a token observance of regulatory requirements" (p. 305). The checklist failed to reveal the source of the agency's conclusions or the data relied on; to establish that consultation with other agencies had occurred; to explain how purported mitigation measures would work; or to describe the project and its environmental setting.

The county also violated CEQA by approving the project **on the condition that mitigation measures be developed and implemented at a later date.** The court concluded that, because the success of mitigation was uncertain, the agency could not have reasonably determined that significant effects would not occur. This deferral of environmental assessment until after project approval violated CEQA's policy that impacts must be identified before project momentum reduces or eliminates the agency's flexibility to subsequently change its course of action (see p. 307).

In addition, because the permit authorized the applicant, himself, subject to planning staff approval, to conduct the required analysis, the county had violated CEQA's requirement that all environmental analysis must ultimately derive from the decision making body itself. By approving the **project without data showing that a solution was possible**, "the county evaded its duty to engage in comprehensive environmental review (id, p. 309)" The county had no right to expect the regional water quality control board to devise a solution under such circumstances.

In invalidating the negative declaration because of a lack of substantial evidence supporting the agency's finding of no significant impact, the court explained that "[t]he agency should not be allowed to hide behind its failure to gather relevant data . . . [because] CEQA places the burden of environmental investigation on the government rather than the public" (id, p. 311)."[15]

It would appear that the above case mirrors many of the dynamics surrounding the BLC project. Like the Sundstrom case, the LAUSD may have failed to resolve the "uncertainties regarding the projects potential to cause significant environmental impacts." Also, in that case, the LAUSD may have approved the initial study "on the condition that mitigation measures be developed and implemented at a later date." Furthermore, like that case, the LAUSD may have approved the "project without data showing that a solution was possible." Again, as discussed above, for a lead agency such as the LAUSD to make claims that are apparently without grounds, opens the possibility that, the filing of the BLC Negative Declaration may have been inappropriate given applicable regulations.

In addition, Section 21064.5 of the Public Resources Code, as well as Section 15070 of the guidelines, cited above, clearly states that any modification that might facilitate a *mitigated* negative declaration must be made prior to issuing the declaration and therefore

[15] Sundtrom v. County of Mendocino (1st Dist. 1988) 202 Cal.App.3d 296 [248 Cal.Rptr. 352].

prior to public discussion. What the LAUSD did was to say what they *planned* to do without stating any specific plans.

Part of the negative declaration process involves review by both responsible agencies and the public. It was during this process that the LAUSD's effort to end the environmental review process was, itself, put to rest.

The Los Angeles City Department of Water and Power (DWP) responded to the LAUSD's Negative Declaration with a resounding protestation. Specifically, the DWP complained that:

> "Based on the above concerns we believe this project, as defined, will have a significant impact on the environment, specifically in the areas of traffic congestion, parking, public safety, socioeconomics, public services, and land use. We believe that a Negative Declaration is not appropriate for a project of this magnitude. We also believe that there may be several reasonable alternatives that should be addressed and included in an Environmental Impact Report".[16]

The City of Los Angeles' Planning Department concluded in their response to the LAUSD's Negative Declaration that:

> "[T]he City Planning Department is concerned that the document does not provide sufficient facts and analysis in order for decision makers to arrive at an informed decision regarding the proposed new high school, particularly with regard to land use and transportation impacts".[17]

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[16] Letter from W. Glauz to I. Finkelstein, October 21, 1993.
[17] Letter from C. Howe to F. Bennett October 20, 1993.

The Los Angeles City Department of Transportation subsequently weighed in with their own concerns and disapproval of the LAUSD's negative declaration that mirrors much of the above.[18]

Despite concerns voiced by various City of Los Angeles agencies, the LAUSD Board of Education approved the negative declaration. It appears to the Committee that the LAUSD was simply "going through the motions" without considering applicable guidelines.

In response to the LAUSD's approval of the negative declaration, a Petition for Writ of Mandate was filed in an attempt to stop the CEQA process from moving forward. The purpose of this writ was for:

> "[T]he court to set aside the (negative declaration) and direct (the LAUSD) to prepare a fully adequate EIR, to include all necessary feasible mitigation, and to propose alternatives to the Project as are necessary and proper under the requirements of CEQA."

Fundamental to that writ is the notion expressed above that a negative declaration may not be mitigated by promises but only by concluded action. In part, the writ states:

> "[T]he mitigated negative declaration may not be based on presumed success of future mitigation measures, future studies, or assurances from the agency that all impacts will be mitigated without first performing the studies necessary to qualify the problem and the proposed remedy. Approval of a project that could result in a significant adverse impact without an EIR is an abuse of discretion."

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[18] Letter from R. Takasaki to F. Bennett, October 1, 1993.

In addition to mirroring those concerns expressed by various City of Los Angeles agencies, this court action was also concerned with toxic contamination. Under the banner of "ON-SITE CONTAMINATION," the 1993 writ states:

"1. Although public comment underscores the chronic and acute risks posed by on-site soil and groundwater contamination and methane gas migration, neither the Negative Declaration nor the LAUSD-prepared, state mandated Health Risk Assessment ("HRA") required by Public Resources Code § 21151.8 and Education Code § 39003 adequately considers the impacts of this significant on-site contamination.

2. The State of California Resources Agency, Department of Conservation, Division of Oil, Gas, and Geothermal Resources advised the LAUSD in a letter dated October 13, 1993 that the proposed project is located in a "high-potential risk zone for gas seepage, as defined in the City of Los Angeles Task Force Report: "Methane Gas Explosion and Fire, Fairfax Area, 1985," emphasizing that methane gas can accumulate beneath developed areas and migrate into the interior of overlying structures, thereby creating the potential for explosion or fire.

3. Similarly, the comments submitted by (Petitioner during the pubic comment period) observed that the "HRA does not consider the chronic and acute risks posed by existing on-site soil and groundwater contamination and methane gas migration. ***These risks may be significant, especially since the methane from the underlying oil fields may drive toxic gases out of the soil in the contaminated areas."***

4. Significantly, the (LAUSD's) Response to (Petitioner's) Comments, which does not deny the significant risks posed by these potential on-site contaminants, totally fails to propose any adequate mitigate. Instead, in responding to the comment by (Petitioner), the LAUSD makes two incredulous statements: (a) that Public Resources Code § 21151.8 and Education Code § 39003 require only assessment of potential emissions generated from off-site facilities within a ¼ mile radius, thus the LAUSD has not given any consideration whatsoever to potential emissions or related hazards which could potentially occur on-site; and (b) the site will undergo some sort of unspecified "remediation" and "all potential risks" will somehow be mitigated in some undisclosed manner.

5. In response to the comment by the Division of Oil, Gas, and Geothermal Resources, the LAUSD responds that "these concerns are addressed through a mitigation measure no. 4 in Section 17, Human Health." Mitigation measure no. 4, however, merely requires that contract documents shall "include the necessary measures required to prevent buildup of methane gas" which "may include" a venting system or "other measures." The response does not attempt to define the scope of the hazard or prescribe the specific measures, which shall be employed to alleviate it."[19]

The "Response to Comments" referred to above is arguably evidence of how lacking in due diligence the LAUSD's efforts were in the preparation of the negative declaration. Beyond the LAUSD's claim that it was exempt from considering the hazards generated at the site itself because the law only required them to consider those sources off-site, the LAUSD also claimed that:

- "The District is exempt from considering the risk of a chemical unless the District interprets the various reference documents provided by oversight agencies;
- Emissions from adjacent Freeways are exempt from District consideration because the law only requires analysis of "fixed facilities" not moving ones like cars and trucks."[20]

Arguably, there are two underlying themes evidenced by the LAUSD's response. First, it is arguable that saying a contaminant is exempt from consideration because a narrow interpretation of the law doesn't require such a consideration evidences an effort by LAUSD staff to seek the letter over the intent of the law. If the LAUSD is relying on manuals from the California Air Pollution Control Officers Association and the U.S. Environmental Protection Agency to make toxic risk assessments, why didn't the LAUSD contact the DTSC as required by Section 25221 of the Health and Safety Code? It would

[19] Trump Wilshire Associates vs. Los Angeles Unified School District, Superior Court of the State of California for the County of Los Angeles, December 15, 1993, boldface added.
[20] "Negative Declaration" Belmont Learning Complex, App. No. 22/64733-11-31, August 9, 1996.

appear that the above is indicative of the LAUSD failure in its due diligence responsibility.

The similarities between those concerns expressed in the 1993 writ and the 1998 DTSC findings of serious toxic concerns at the BLC site is striking. Clearly, the LAUSD can not argue they were unaware of toxic problems at the current BLC site until told otherwise by the DTSC. Of particular note is the hazard produced by methane bringing other toxins to the surface. Almost all discussions by the LAUSD concerning toxins treat methane as an isolated problem that is primarily one of explosion. By treating methane in this way, the LAUSD can argue that, while methane is unavoidable, it is only a nuisance that is quickly mitigated by proper venting to open air. Furthermore, under this view of methane, any gas seepage in open areas like the football field is irrelevant. This classification of methane as irrelevant in open air was directly contradicted by the DTSC's November report wherein it states that methane "could present a potential health risk to future occupants at the site from migration to indoor and outdoor air, particularly since benzene is a known human carcinogen." It should be clear now that the methane/toxic concerns expressed by the DTSC in 1998 were fully known to the LAUSD not later than 1993.

The LAUSD was forced to abandon its attempt to employ a negative declaration by the courts and was subsequently required to conduct a full EIR evaluation. The first step in the EIR process is the "Notice of Preparation (NOP)."

Notice of Preparation

Section 15082 of the CEQA guidelines in part, describes the NOP process as follows:

> "15082.(a) Immediately after deciding that an environmental impact report is required for a project, the lead agency shall send to each responsible agency a notice of preparation stating that an environmental impact report will be prepared.

This notice shall also be sent to every federal agency involved in approving or funding the project and to each trustee agency responsible for natural resources affected by the project.

(1) The notice of preparation shall provide the responsible agencies with sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response. . . .

* * *

(d) State Clearinghouse. When one or more state agencies will be a responsible agency or a trustee agency, the lead agency shall send a notice of preparation to each state responsible agency and each trustee agency with a copy to the State Clearinghouse in the Office of Planning and Research. The State Clearinghouse will ensure that the state responsible agencies and trustees reply to the lead agency within the required time. (See also Sec. 21080.4, P.R.C. and Sec. 15375, guidelines)

* * *

The State Clearinghouse, in its effort to get NOPs to the appropriate state agencies, relies on the lead agency's description of the project in the NOP itself. In the case of the LAUSD's NOP for the BLC project, that NOP had only the following to say:

"The District will be the Lead Agency and will prepare an environmental impact report for the project identified below. We need to know the views of your agency as to the scope and content of the environmental information which is germane to your agency's statutory responsibilities in connection with the proposed project. Your agency will need to use the EIR prepared by our agency when considering your permit or other approval for the project."

The LAUSD's Notice of Preparation goes on to conclude:

> **"Project Description:** LAUSD in partnership with Temple/Beaudry Partners proposes to develop a mixed use project consisting of: 1) high school facilities for up to 3,700 students on a regular schedule basis and up to 5,500 students on a year round calendar basis; 2) up to 200 affordable housing units; 3) up to 120,000 square feet of community retail potentially including a supermarket, restaurant, or similar uses; and 4) up to 50,000 square feet of community facilities potentially including child care, health clinic or police substation, or other similar facilities."

Nowhere in the LAUSD's NOP is there any mention of hazards, much less toxic ones. The Initial Study as an attachment to the NOP, does mention toxic hazards but not until page eight where one of the sixteen boxes, marked "Hazards," is checked. Other than the check mark in this box, the only other reference to those toxins identified in the1989 McLaren report, and the ability of methane to bring other toxins to the surface, as discussed in the Write of Mandate in 1993, are two small sections located on page eighteen. In response to the question:

> "Would the proposal involve a risk of accidental explosion or release of hazardous substances (including, but not limited to; oil, pesticides, chemicals, or radiation)?"

The LAUSD responded:

> "The project is located atop a historic oil field which represents a potential for methane gas seepage and, possibly, surface oil leaks from the abandoned 19th century wells. The project provides for retention of active producing wells to relieve gas pressure and includes construction of venting systems as appropriate. These and other measures, which will reduce the risk of accident to a less than significant level, will be further discussed in the EIR."

On the same page, the further question is asked:

"Would the proposal involve exposure of people to existing sources of potential health hazards?"

The LAUSD responded:

"Previous oil field operations and former commercial uses, such as gas service stations, resulted in some soils contamination at certain portions of the site. In the vicinity of the project site are LAUSD and LADWP communications facilities, which may emit electromagnetic fields. These concerns and mitigation measures developed to reduce potential hazards will be discussed in the EIR."

Considering what the LAUSD knew about the site at the time of this 1995 report, it appears that the LAUSD may not have fully expressed the true contaminant problem to authorities. If efforts were made to shield information from oversight agencies, the question of thwarting legislative intent comes into play.

The LAUSD might argue in its defense that, since they submitted their NOP to the State Clearinghouse, that act constitutes due diligence. Why, then, did the DTSC not respond to the LAUSD's NOP? When asked why they never responded to the LAUSD's NOP, the DTSC wrote to this Committee saying:

"Pursuant to your request, I have reviewed the Notice of Preparation (NOP) for the Belmont Learning Complex draft Environmental Impact Report distributed to reviewing agencies on December 26, 1995. I have confirmed that this document was not forwarded to the Department of Toxic Substance[s] Control for comment at the time of its initial circulation. Typically, the State Clearinghouse will forward documents they receive from local agencies to state reviewing agencies based on the issues of concern identified by the lead agency in the NOP. The project description

provided in the NOP does not identify any issues related to toxins that would have triggered the State Clearinghouse forwarding the document to our office for review."[21]

The State Clearinghouse was also asked why the NOP in question was not forwarded to the DTSC but due to the reorganization their department is currently undergoing, they were not able to respond by publication time. An answer to the above is expected from the State Clearinghouse in the near future.

It appears that the above CEQA performance by the LAUSD may have been intentional inasmuch as the extent of toxic contamination may have been well known when the NOP was prepared. How such a scenario could become reality might be partially explained by reviewing the following LAUSD CEQA Committee report that took place only a few weeks earlier. The Committee's entire report is as follows:

"DATE: November 8, 1995"

| | |
|---|---|
| "TO: | Dominic Shambra and Wayne Wedin |
| | (for distribution to TBP and LAUSD teams) |
| | (cc: Bob Niccum, Lisa Gooden, Ed Szczepkowski) |
| FROM: | David W. Cartwright |
| SUBJECT: | CEQA Committee Report" |

"The CEQA Committee met on November 2, 1995. In attendance were Bob Niccum, Lisa Gooden, Martha Jordan, Ed Szczepkowski, Dan Nieman and David Cartwright.

[21] Letter from F. Moss to B. Steele, January 28, 1999.

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"The Committee established a CEQA critical path schedule and a tentative Project Description. The Project Description is currently in draft form and subject to fine-tuning of the TBP proposal, the Belmont remodel and Communications Academy issues.

"The Committee then dealt with defining the site and the additional parcels, which may be included. There are three permutations of the site. Site IA is the basic Shimizu and Temple/Beaudry properties plus a small piece of private land at the corner of Colton and Boylston. Site IB is Site IA plus several private properties along Colton between Boylston and Edgeware (but excluding the properties on the corners Colton and Edgeware). Site IC is Site IB plus the private property on the southwesterly corner of Edgeware and Colton.

"The Moret property at Temple/Beaudry and the private property on Colton between Edgeware and Toluca are not included in any option. The Committee believes that neither property adds to the Project in any material way sufficient to justify the potential cost. No condemnation is contemplated. Additional parcel acquisitions would be carried out by TBP (or its partners).

The Committee assigned the following tasks:

"Bob Niccum will talk with four potential environmental consultants regarding (I) existing environmental documents including the Temple/Beaudry EIR, the Belmont New Senior High Mitigated Negative Declaration, the Central City West Specific Plan EIR and the draft Shimizu Project EIR, (ii) the additional work necessitated by consideration of Site Option IB and IC, (iii) cost and possible stages of work.

"On behalf of the housing developer (or TBP), Dan Nieman, will explore the interest of the private owners (in all site options) in a negotiated sale. Dan Nieman is also to identify cost savings from using sites IB and IC. He will also

explore housing relocation possibilities to the Temple Edgeware project (in which the LAUSD has certain contractual relocation rights).

"A subcommittee including Martha Jordan, Dan Nieman, David Cartwright and Lisa Gooden will meet within 2-3 weeks with city planning staff to give them a "heads up" on the imminent EIR and advise them on the City's role as "responsible agency" only.

**"D.W.C.** [David Cartwright]"

Does this memo reflects a meeting that is dominated by concern for the environment and human health or does this memo sound more like a real estate meeting to discuss a transaction? It appears that the latter is more likely since all the participants are either real estate related employees or consultants connected with the business side of project development. Where are the environmental experts? Where are the CEQA specialists? It appears that the above memo arguably clears the way for speculation that the motives of the LAUSD may have been dominated by environmental or human health concerns but by issues of commercial expedience.

Draft Environmental Impact Report

Once the NOP process has come to a close, the next step is the EIR itself. Before the final EIR is prepared, the lead agency must produce a Draft EIR (DEIR). Section 15084 of the CEQA guidelines sets the parameters of the DEIR. That section states:

> "15084. (a) The draft EIR shall be prepared directly by or under contract to the lead agency. The required contents of a draft EIR are discussed in Article 9 beginning with Section 15120 [pertaining to contents of EIR's and consisting of Sections 15120 to 15132, inclusive].
>
> "(b) The lead agency may require the project applicant to supply data and information both to determine whether the project may have a significant effect on the environment and to assist the lead agency in preparing the draft EIR. The requested information should include an identification of other public agencies which will have jurisdiction by law over the project.
>
> "(c) Any person, including the applicant, may submit information or comments to the lead agency to assist in the preparation of the draft EIR. The submittal may be presented in any format, including the form of a draft EIR. The lead agency must consider all information and comments received. The information or comments may be included in the draft EIR in whole or in part.
>
> * * *"

Section 15123 of guidelines states, in part:

> "15123. (a) An EIR shall contain a brief summary of the proposed actions and its consequences. The language of the summary should be as clear and simple as reasonably practical.
>
> "(b) The summary shall identify:

"(1) Each significant effect with proposed mitigation measures and alternatives that would reduce or avoid that effect;

"(2) Areas of controversy known to the lead agency including issues raised by agencies and the public; and

(1) Issues to be resolved including the choice among alternatives and whether or how to mitigate the significant effects.

* * *"

The twenty-one page summary of LAUSD's DEIR makes virtually no mention of hazardous problems at the BLC site. On page six under the banner "Potential Significant Impacts That Can Be Avoided or Mitigated," are the following bullets:

- "Construction-related impact on three schools in the project's immediate vicinity
- Traffic impact on up to four area intersections;

- Hazards related to historic oil field use and nuisance odors from auto repairs on the following page is under the heading "Less Than Significant Impacts," the summary states:

"The following six project impacts are found to result in either no effect or a minimal effect on the physical environment:

- "Land use and planning
- Population and housing
- Project's generation of students
- Traffic impact on CMP facilities
- Hazards, other than those related to oil field and nuisance odors

- Growth-induced potential"

The only other mention of hazardous toxins is relegated to a table towards the back of the summary where it states that all toxic concerns are "less than significant" due to various unspecified plans for remediation. It would seem reasonable to suggest that giving the same emphasis to a stop light as to hazardous contamination – considering what the LAUSD' knew in 1996 about the site's contamination problems—does not satisfy general notions of due diligence on the part of the LAUSD. Furthermore and possibly more significant is the LAUSD's treatment of potentially significant environmental impacts as *less than significant* by way of unspecified remediation efforts. This is exactly why the LAUSD was prevented from issuing a negative declaration only a few months earlier by the Court.

The body of the BLC DEIR makes the following statement concerning contamination:

> "2.6 HAZARDS
> "ENVIRONMENTAL SETTING
>
> "The hazards which may effect [affect] the project site include potential toxic air emissions from adjacent industrial and commercial uses and from vehicles traveling on the nearby Harbor Freeway; soil contamination from abandoned oil wells and underground storage tanks; methane gas accumulation; and potentially, electric and magnetic fields generated by nearby facilities.
>
> **"Underground Storage Tanks:** There is [are] at least four underground oil storage tanks located within the portion of the site bounded by Toluca Street, First Street, Edgeware Road and Colton Street. An oil derrick and wells are known to exist or were previously located within this block. Illegal dumping also has been known to occur at this location. Further, south at First Street and Beaudry

Avenue, ARCO installed underground storage tanks in 1972, at a former gas station. These tanks are twenty-four years old and of an unknown capacity.

**"THRESHOLDS USED TO DETERMINE SIGNIFICANCE OF IMPACT**

Impact will be considered significant if mobile sources of emissions from existing stationary sources within a quarter mile radius of the site, or from methane gas accumulation will present a potential hazard or will conflict with the proposed uses of the site.

**"Oil Wells:** The proposed project will result in a beneficial impact by re-abandoning oil wells, and potentially leaking oil wells to current specifications required by the State Department of Conservation Division of Oil and Gas [Division of Oil, Gas, and Geothermal Resources], and removing soils containing fuel hydrocarbons that may be uncovered during grading and excavation. The District has prepared a detailed work plan for excavation and treatment of abandoned wells.[7]

"As previously discussed, the project site lies within a high potential risk zone for gas seepage. Methane gas can accumulate beneath areas improved with concrete and asphalt surfaces and prevent the natural migration of the methane gas to the atmosphere. If this occurs with cracks in the concrete or asphalt surface, the gas may migrate into the interior of the overlying building or structure and increase the potential for explosion or fire. To avoid this occurrence, mitigation measures have been required in accordance with the Division of Oil and Gas [sic] recommendations, which would include installing gas detectors, gas migration barriers, or venting systems, if needed.

**"Underground Storage Tanks (USTs):** Previous site investigations revealed no indications that old storage tanks were equipped with leakage monitoring devices. Therefore, it is possible that leakage may have occurred undetected at

any of the UST locations. Any soils contaminated by leaking USTs will be remedied prior to construction in accordance with existing regulations as detailed in a work-plan prepared by the District.[7] Cleanup will be conducted in conformance with existing regulations and guidelines of the Regional Water Quality Control Board's *The Leaking Underground Fuel Tank Field Manual* which guides site assessments, cleanup, and UST disclosure. These activities require coordination with local authorities (i.e., fire and health departments) and the State Department of Health Services. The Los Angeles Fire Department is the local agency responsible for UST permitting and inspection, and will be contacted with respect to tank removal.

"Overall, the proposed project will have a beneficial effect of remediating existing contamination from previous activities on the site. In accordance with existing federal, state, and city requirements the site will be remediated more rapidly because of the immediate reuse of the site for the proposed Belmont Learning Complex.

"The potential for hazards from methane gas seepage and buildout will be reduced to a less than significant level by implementing measures **in accordance with the Division of Oil and Gas [sic] recommendations**."

It appears that the relationship between the LAUSD and the Division of Oil, Gas, and Geothermal Resources was a contentious one. Statements to this effect will be discussed in detail below when we consider what the District Deputy of the division had to say before the LAUSD Board of Education during the EIR Certification meeting. The division was unaware at that meeting that they were in "negotiations" with the LAUSD.

The body of the DEIR goes on to state as follows:

**"MITIGATION MEASURES**

"(1) A soil remediation program **will be** completed prior to the construction of structures at any given location on the site in conformance with all applicable federal, state and local requirements. The remediation activities shall be reviewed and approved by the **Fire Department's Underground Storage Tanks Unit**.

"(2) Leaking underground storage tanks shall be removed in accordance with conditions of a valid Division 5 Permit from the Underground Tanks Unit of the City of Los Angeles Fire Department.

"(3) Re-abandonment of oil wells shall be conducted in conformance with the current requirements of the Division of Oil and Gas [sic].

"(4) **If needed**, a methane gas control system to prevent build-up under the structures and/or pavement, such as a venting system, shall be provided. The control system shall be designed in conformance with the City of Los Angeles Memorandum of General Distribution #92 Requirements.

"5) Methane gas seepage shall be remediated in conformance with L.A.M.C. Section 91.1501 of the Los Angeles Building Code.

**"LEVEL OF SIGNIFICANCE AFTER MITIGATION**

Implementation of mitigation measures together with all applicable federal, state, and local regulations **will reduce hazards to current safety levels**."

Nowhere in this DEIR is there any mention of need for further assessment. Reading the above reasonably leaves the reader to conclude that the scope of hazardous conditions at the BLC site are adequately determined and that the only needed action remaining is to conduct the actual cleanup. But, as the DTSC stated in November 1998, assessment of the BLC site still lacked the basic elements of adequacy some two years later.

What really compounds the problem here is the apparent lack of basic information necessary to state that various remediation plans would reduce toxic contamination to

"less than significant levels." While this DEIR was released in July 1996, over the next five months the LAUSD was still receiving proposals for toxic assessment and authorizing approval for additional assessment. In a letter dated December 30, 1996, from LAUSD's Director of Planning and Development, Dominic Shambra, to the Temple/Beaudry Partners' Project Executive, Kenneth Reizes, there is a request for eight additional soil borings. The letter further states:

> "These additional borings were requested by Turner/Kajima (the BLC project general contractor) in order to assure the Team of the underlying conditions below these buildings, and also to detect if organic soil vapors are detected in the soil in these areas."

On January 6, 1997, Mr. Riezes sent a letter to Mr. Shambra with two supplemental enclosures to the above December 30th letter. This letter explains that these supplements are for obtaining approximately 70 new environmental samples. One hand written note attached to this letter obtained by the Committee reads:

> "Hold until Ray [Rodriguez] gets feedback from 1/13 meeting w/ Ken [Reizes]. Ken needs to **reduce** amount of work if the 2 geotech reports [the] district has discloses information that's helpful."

Followed by another note that reads:

> "Ken Reizes comments that the information in these new reports is not specific enough to reduce [the] scope of investigation and analysis of these contracts – no reduction in cost is warranted."[22]

[22] Letter from D. Shambra to K. Reizes, January 6, 1997.

This dialogue against the backdrop of the original memo arguably does not indicate that the necessary environmental assessment required to make the statements found in the DEIR is complete. How can the LAUSD judge the severity of the toxic hazard at this site when it is still assessing five months after claiming that everything was under control?

It would be one thing to argue that the LAUSD's CEQA Officer and Director of Real Estate and Planning, was inattentive when it comes to environmental assessment and remediation. Such an argument falls apart, however, when it is likely from the above that assessment was not inadequate but may have been, in some cases simply nonexistent. Either the officer was satisfied with the amount of assessment at the time of the DIER or he was not. It seems illogical that such a manager could change his mind as to the extent of needed assessment on this type of project from one week to the next – especially after he had put in writing that the matter was all but closed. From the above, it appears that not only was the site not fully assessed at the time of the DEIR but that parties close to the project may have known about the inadequacies of the Report.

On January 14, 1997, Mr. Shambra authorized a proposal from LAW/CRANDALL "to review the environmental documents provided to us by [LAUSD's] Mr. Kenneth Reizes on December 27, 1996." The purpose of this document review was to evaluate past work so as to develop a new remediation plan. How could the LAUSD represent itself as already having a remediation plan when six months later the consulting firm hired to develop that plan had not yet analyzed the most basic historical information critical to such a plan?

What appears to further complicate the notion that environmental remediation plans were reasonably quantified at the time of the DIER is an "Allowances and Exclusions to: Revised Overall Fixed Development Price" submitted by the development team, Temple/Beaudry Partners, dated March 21, 1997. In this revision, those items no longer covered by the fixed development price of the BLC project included all of the following:

- Hazardous material testing, mitigation, and removal of hazardous soils
- Any requirements of imposed CEQA and/or EIR
- Any work associated with the design and/or construction of methane related control systems
- Costs if testing and discharge of subsurface water if required by the State Water Resources Control Board.

It remains unclear why, after the LAUSD asserted that remediation issues were under control in their DEIR the firm holding overall construction responsibility for the project would seek to avoid guaranteeing the cost of any and all aspects of environmental assessment and remediation. It would appear that this late change of heart by the Temple/Beaudry Partners is a strong indication that environmental issues at the BLC site were not under in control at the time of the DEIR. If the above scenario is true, it appears that LAUSD staff may not have fully represented the situation, potentially compromising public safety.

The LAUSD might argue that it was not themselves who actually prepared the BLC DEIR but an outside contractor. It might be further argued that responsibility for the EIR's content is therefore somehow in part or fully the responsibility of that independent contractor. In fact, the LAUSD did use an outside consultant to prepare its EIR. The law, however, defines responsibility in those scenarios where responsibility is in question. Subdivision (c) of Section 21082.1 of the Public Resources Code states:

"(c) The lead agency shall do all of the following:

"(1) Independently review and analyze any report or declaration required by this division [CEQA].

"(2) Circulate draft documents which reflect its independent judgment.

"(3) As part of the adoption of a negative declaration or certification of an environmental impact report, find that the report or declaration reflects the independent judgment of the lead agency."[23]

While the CEQA process requires a lead agency as part of the adoption of a final EIR, to find that the final EIR reflects the independent judgement of the lead agency (para. (3), subd.(c), Sec. 21082 P.R.C.), the above language that the lead agency "shall...[i]independently review and analyze any report or declaration required by this division" appears to reasonably indicate that the content of any and all CEQA related documents are primarily the responsibility of the lead agency. Such responsibility must arguably include the DEIR. Therefore, the DEIR can only be considered the full responsibility of the lead agency, which in this case is the LAUSD.

Such reasoning is also found in court decisions. In Friends of La Vina v. County of Los Angeles (1991) 232 Cal. App. 3d1446 hereafter La Vina, a citizens group filed a suit for a writ of mandate to stop a project that involved the development of 220 "largely open" land acres in Altadena. The group's argument was that the new project violated CEQA because the DEIR was prepared by an independent contractor (La Vina, supra at p. 1451). It was further argued that such a process was flawed because an independent contractor might perform more in keeping with the desires of their client rather than notions of due diligence. While the Superior Court agreed with the complainants, the Court of Appeal reversed saying that responsibility for such documents lies with the Lead Agency regardless of who actually prepares the documents.

The court the La Vina went on to explain:

"The decision below purported to expound and apply the legal truism that under CEQA an EIR must be "prepared directly by, or under contract to, a public

[23] (Amended by Stats. 1991, Ch. 905, Sec. 1.)

agency," not by a private applicant or its agent. According to the court, this requirement means that an EIR must be written and composed by the agency, so that an EIR whose constituent documents are drafted for the agency by the applicant's consultant is necessarily invalid, without regard to how much agency input, direction, evaluation, and independent judgment went into it. Although the merits of this approach as a matter of policy may be debatable, the court's interpretation was erroneous as a legal matter, because it conflicts with CEQA, the Guidelines, and all relevant case law. Those controlling sources consistently teach that an agency may comply with CEQA by adopting EIR materials drafted by the applicant's consultant, so long as the agency independently reviews, evaluates, and exercises judgment over that documentation and the issues it raises and addresses," (La Vina, supra at p. 1452; citations omitted).

The Court also cited subdivision (d) of Section 15084 of the CEQA guidelines which expressly allows agencies to accept "a draft prepared by the applicant, a consultant retained by the applicant, or any other person," (La Vina, supra at p. 1453). The court emphasized though, that subdivision (e) of Section 15084 of the guidelines the same provision requires the agency to subject such a draft to its "own review and analysis," (Ibid.) The court added that a draft EIR that is released to the public for review "must reflect the independent judgement" of the lead agency, and that the "lead agency is responsible for the adequacy and objectivity of the draft EIR," (Ibid. citations omitted). The court found that this requirement, that the agency apply independent review and judgement to the work product before adopting and using it, has been endorsed by several other appellate courts as a way of ensuring against charges of unlawful delegation (Id. at p. 1454).

It would appear from the above that the source of responsibility for the DEIR, lies squarely in the hands of the lead agency – in this case with the LAUSD. Since Mr. Niccum is both the CEQA officer and Director of Real Estate and Asset Management for the LAUSD and the BLC project, it would seem reasonable that the accuracy of all forms of the EIR would be his responsibility.

Another important dynamic of the EIR process involves an open discussion of project alternatives. In the case of the BLC, there were three sites being considered:

(1) Temple/Beaudry – the site eventually selected

(1) Fransciscan Property

(2) Southern Pacific Railroad Yards

As early as 1991, the City of Los Angeles was involved in this same discussion as the LAUSD was considering the construction of the "Belmont High School." At that time, the City of Los Angeles Department of Planning chose the forty-five acre Southern Pacific site over other alternatives including the current Temple/Beaudry site. The number one reason the site was chosen over the others was "1. The Draft EIR identifies no toxins on the site." The number one reason why the other sites were rejected was "1. The presence of toxins could be hazardous to the students. Although a cleanup is underway, residual toxins are a concern."[24] This response from the City Planning Department arguably put the LAUSD on notice that selecting a site with toxic concerns was going to be a problem.

At the time of the BLC Final EIR (FEIR), the Southern Pacific site was still on the alternative list but was rejected by the LAUSD in favor of the Temple/Beaudry site. The FEIR concludes its discussion of these alternatives with the following statement:

> **"CHOICE AMONG ALTERNATIVES**
>
> None of the alternatives evaluated in the EIR has been found to be clearly environmentally superior to the [BLC] project. While some alternatives would result in overall greater impacts than the project, other alternative development scenarios would result in a mix of beneficial and adverse environmental impacts.

[24] Letter from R. Haro to C. Cogan, February 13, 1991.

Since the proposed project provides the largest benefits to the community, and in most instances mitigation measures have been developed to substantially lessen its potentially significant impacts, the proposed project, either with or without retail facilities, is considered to be the LAUSD's preferred alternative."

In considering alternatives there is no side-by-side cost/benefit analysis as described above. Rather, it is as if the LAUSD weighed quantitative disadvantages of toxic concerns against other "competing" issues. It appears that health and safety concerns were not the highest priority for the LAUSD.

There are special EIR considerations in addition to general requirements discussed above whenever a project involves a school or toxic contamination. If the LAUSD had satisfied Section 25221 of the Health and Safety Code and formally requested the DTSC make a toxic determination of the BLC site, and if the DTSC had designated the site as a hazardous waste property or a border zone property pursuant to Section 25229 of the Health and Safety Code, the LAUSD would have been required by Section 21092.6 of the Public Resources Code to indicate that designation in the DEIR. Section 21092.6 states, in part,

"21092.6.(a) The lead agency shall consult the lists compiled pursuant to Section 65962.5 of the Government Code [Hazardous waste sites, among others] to determine whether the project and any alternatives are located on a site which is included on any list. The lead agency shall indicate whether a site is on any list not already identified by the applicant. **The lead agency shall specify the list and include the information in the statement required pursuant to subdivision (f) of Section 65962.5 of the Government Code, in the notice required pursuant to Section 21080.4, a negative declaration, and a draft environmental impact report. The requirement in this section to specify any list shall not be construed to limit compliance with this division [CEQA].**"

As a result of apparently not performing their project development duties with due diligence, the LAUSD may have also failed to adequately provide the required information pertaining to toxic contamination in their EIR.

Furthermore, an EIR must also include special considerations whenever the project is a public school. Subdivision (a) of Section 21151.8 of the Public Resources states, in part:

> "21151.8 (a) No environmental impact report or negative declaration shall be approved for any project involving the purchase of a schoolsite or the construction of a new elementary or secondary school by a school district unless all of the following occur:
>
> " (1) The environmental impact report or negative declaration includes information which is needed to determine if the property proposed to be purchased, or to be constructed upon, is any of the following:
>
> "(A) The site of a current or former hazardous waste disposal site or solid waste disposal site and, if so, whether the wastes have been removed.
>
> "(B) A hazardous substance release site identified by the State Department of Health Services in a current list adopted pursuant to Section 25356 for removal or remedial action pursuant to Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.
>
> * * *"

In the context of the hazardous waste control laws a "hazardous waste disposal site" means any site defined in Section 25114 of the Health and Safety Code, which states:

"25114 Disposal site means the location where **any** final deposition of hazardous waste occurs.[25]

The LAUSD may have failed in its responsibility to ensure that the EIR, draft or otherwise, conformed to appropriate regulations.

Notice of Completion

Once the DEIR has been prepared, the lead agency must file a "notice of completion" (NOC) with the Office of Planning and Research. According to Section 21161 of the Public Resources Code:

"21161. Whenever a public agency has completed an environmental impact report, it shall cause a notice of completion of that report to be filed with the Office of Planning and Research. The notice of completion shall briefly identify the project and shall indicate that an environmental impact report has been prepared. Failure to file the notice required by this section shall not affect the validity of a project."

While filing the NOC, the lead agency must also notify the public that the DEIR is ready for outside comment. Section 21092 of the Public Resource Code requires with regard to public notices that the following be done:

"21092. (a) Any lead agency which is preparing an environmental impact report or a negative declaration or making a determination pursuant to Section 21157 [master EIRs] shall provide public notice of that fact within a reasonable period of time prior to certification of the environmental impact report or adoption of the negative declaration.

[25] (Amended by Stats. 1977, Ch. 1039.)

"(b) (1) The notice shall specify the period during which comments will be received on the draft environmental report or negative declaration, and shall include the date, time, and place of any public meetings or hearings on the proposed project, a brief description of the proposed project and its location, the significant effects on the environment, if any, anticipated as a result of the project, and the address where copies of the draft environmental impact report or negative declaration, and all documents referenced in the draft environmental impact report or negative declaration, are available for review.

* * *"

While it appears reasonable that the levels of toxins found in the BLC site soil as early as 1989 would satisfy the concept of "significant," the LAUSD failed to indicate that in their NOC.

Public Review of Draft Environmental Impact Report

Like the final EIR, the DEIR must be circulated for review by all relevant parties who are required, as responsible parties or encouraged as interested parties to make formal responses. According to subdivision (c) of Section 21082.1 of the Public Resources Code:

"(c) The lead agency shall do all of the following:

(1) Independently review and analyze any report or declaration required by this division [CEQA].

2 (2) Circulate draft documents, which reflect its independent judgment.

3 (3) As part of the adoption of a negative declaration or certification of an environmental impact report, find that the report or declaration reflects the independent judgment of the lead agency."

The lead agency is required to ensure that the DEIR contains sufficient information for all parties to make informed decisions. In *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App. 3d 421, a citizens group sought a writ of mandate to set aside a decision of Ventura County certifying an EIR and modifying a conditional use permit to allow the proposed expansion and modification of an oil refinery. The Superior Court denied the petition, but the Court of Appeal reversed, citing the inadequacy of the document's analysis of cumulative air quality impacts associated with offshore oil drilling (Id. at p. 430)

The EIR in that case stated that these impacts were insignificant, relying for that conclusion on the county's existing air quality management plan ("AQMP") (County of Ventura, Supra. at pp. 426-27). The latter document, however, did not reach such a conclusion. Rather, the AQMP stated that no existing scientific model could adequately analyze such impacts but that air pollution emissions could potentially effect onshore air quality and that those emissions would contribute to smog levels (Id. at p.431). Faced with this misleading statement in the EIR, the Court of Appeal remanded the case back to the trial court with instructions to issue a writ of mandate directing the County of Ventura to void its certification of the final EIR and approval of the modifications of the conditional use permit until an EIR that adequately addresses the cumulative air quality impacts is prepared and all other CEQA prerequisites are satisfied (Id. at p. 432).

The BLC DEIR was approved for public review by the LAUSD Board of Education on November 18, 1996. While the LAUSD sent the DEIR to the State Clearinghouse, they did so without sufficient information so as to indicate the document should be sent to the DTSC. Subsequently, the DTSC was again left out of the project approval process.[26]

During this public review period of the DEIR, the following comments were received by various non district parties:

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[26] Ibid, FN #32.

- **California Regional Water Quality Control Board:**

> "This document indicates that the proposed development will change absorption rates, drainage patterns, or the rate and amount of surface runoff. However, the document also states that there is no change in the amount of surface water in the receiving waterbody. Your DEIR should address the impacts that would result from increased runoff to water quality and to beneficial uses in the receiving water body."[27]

The **Resources Agency** made the following comment:

> "Regarding Table ES-1 of the Summary of Environmental impacts and Mitigation Measures, under the Impact Category entitled "Hazards," Mitigation Measure 6 states that existing producing oil wells shall be reexamined as needed to relieve pressures in the field. The Department recommends that the Final Environmental Impact Report (FEIR) include a detailed plan for managing any buildup of reservoir pressure in that portion of the oil filed. Monitoring and well maintenance should also be addressed in the FEIR."[28]

The **State Department of Transportation** requested, by letter, a study of freeway on and off-ramps that surround the BLC site. The letter then states:

> "If mitigation measures are recommended as a result of this analysis, which are within or affects State right-of-way, the applicant needs to apply for an encroachment permit."[29]

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[27] letter to B. Niccum from W. Phillips, January 25, 1996.
[28] Letter from J. Marshall to E. Harris, September 4, 1996.
[29] Letter from S. Buswell to C. Belsky, August 23, 1996.

The City of Los Angeles Department of Transportation expressed concerns over the LAUSD's use of improper traffic use studies.[30] Separately, engineers for the City of Los Angeles Department of Public Works found numerous deficiencies. These engineers expressed concern over inadequate sewer relocation and abandonment, inadequate geologic analysis, non-addressed impact of wastewater and various required permits that the LAUSD had failed to request.[31] The City of Los Angeles Police Department (LAPD) was concerned that the LAUSD's DEIR "contains information attributed to the LAPD that the LAPD did not provide." The LAPD response goes on to express concern over the LAUSD's use of statistics that the LAPD refers to as "erroneous."[32]

A number of legal firms also submitted responses to the DEIR that were critical of the document's lack of specifics. One firm retained a panel of experts to "review the adequacy of the DEIR from a technical perspective." This response goes on to explain:

> "These experts have identified a host of significant, fundamental deficiencies in the DEIR. The principal theme of [this submittal] is that the DEIR lacks the good faith reasoned analysis mandated by the California Environmental Quality Act ("CEQA"), instead relying on conclusory, incomplete, circular and in some instances incomprehensible discussions of various aspects of the project. Consequently, basic information necessary for a legally adequate disclosure document is lacking."
>
> As elaborated in the enclosures, items deemed deficient include the following:
>
> - The failure to provide a finite project description;
> - The circularity and lack of data to support the project objectives (especially as to the student capacity and the actual net new affordable housing units);

[30] Letter from R. Takasaki to E, Harris, September 5, 1996.
[31] Letter from W. Savaria to B. Niccum, August 28, 1996.
[32] Letter from J. Williams to E. Harris September 3, 1996.

- The outdated, perfunctory and self-serving discussion of alternatives (LAUSD's asserted project objectives entirely supersede environmental considerations in the comparison of alternatives);
- The failure to evaluate fundamental items such as seismic impacts, feasible mitigation of student parking impacts, the secondary impacts of proposed street vacations, and the loss of affordable housing as contemplated in the original Central City West Specific plan;
- The reliance on future actions as mitigation;

**"In sum, the LAUSD has failed to provide an objective, comprehensive disclosure document meeting the standards imposed by CEQA."**[33]

Response to Comment on Draft Environmental Impact Report

Once the DEIR is circulated and comments are received by the lead agency, the lead agency is then required to formally respond. Those requirements to formally respond are set forth in Section 15088 of the CEQA of the Guidelines, as follows:

> "15088 (a) The lead agency shall evaluate comments on environmental issues received from persons who reviewed the draft EIR and shall prepare a written response. The lead agency shall respond to comments received during the noticed comment period and any extensions and may respond to late comments.
>
> "(b) The written response shall describe the disposition of significant environmental issues raised (e.g., revisions to the proposed project to mitigate anticipated impacts or objections). **In particular, the major environmental issues raised when the lead agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not**

[33] Letter from E. Watson of Greenberg, Glusker, Fields, LLP to E. Harris, September 9, 1996.

**accepted. There must be good faith, reasoned analysis in response.** Conclusory statements unsupported by factual information will not suffice.

"(c) The response to comments may take the form of a revision to the draft EIR or may be a separate section in the final EIR. Where the response to comments makes important changes in the information contained in the text of the draft EIR, the lead agency should either:

"(1) Revise the text in the body of the EIR, or

"(2) Include marginal notes showing that the information is revised in the response to comments"[34]

The LAUSD responded to thirteen individuals and groups who formally commented on the DEIR. Only one of these comments, however, dealt with issues of toxic hazards. The following is a portion of that comment in bold followed by the LAUSD's response:

State of California Resource Agency

**"The Department [of Conservation] recommends that the Final Environmental Impact Report (FEIR) include a detailed plan for managing any buildup of reservoir pressure in that portion of the oil field. Monitoring and well maintenance should be addressed in the FEIR. Finally, please forward for review a copy of the proposed plan to the Division [of Oil, Gas, and Geothermal Resources]."**

[34] Authority cited: Sections 21083 and 21087, Public Resources Code. Reference: Sections 21104 and 21153, Public Resources Code; People v. County of Kern, (1974) 39 Cal. App. 3d 830; Cleary v. County of Stanislaus, (1981) 118 Cal. App. 3d 348.

LAUSD

"The detailed plan for managing oil wells and specific techniques to be used to relieve any buildup of reservoir pressure in the field is part of a development-processing phase of the project. The plan **will be** based on the *Report on Field Operations: Location of Former Oil Wells*, prepared by Intera's engineers in August 1996. The mitigation measure in the EIR has been amplified by adding a requirement that the LAUSD and joint venture partners in consultation with the Division **shall prepare** a detailed plan for managing any reservoir buildup pressure, including monitoring and well maintenance. The plan **will** specify which, if any, remote pressurizing/venting, maintenance of some existing wells, drilling new wells, or other measures currently being discussed with the Division, will be used at specific locations. This information has been included in the final EIR to amplify the discussion in Section 2.6, Hazards."

Notice the boldface addition to the above. The LAUSD's reference to their remediation plan is almost entirely in some form of the future tense without offering any specifics in the present. The above might be characterized as more promises against the backdrop of the Division of Oil, Gas, and Geothermal Resources specifically recommending that the LAUSD include in the FEIR "a detailed plan" of action and forward that plan to the Department of Conservation. All one needs to do is look back a few pages in the same EIR to find other "promises" may never have been fulfilled, such as the promise on page 2.6-8, where it states:

"All known soil contamination shall be remedied prior to the construction of structures at any given location on the site in conformance with all applicable federal, state, and local requirements."

It is now clear from the February 1998 DTSC report that the above was not done prior to the beginning of construction.

What was not included in this section of the FEIR is also noteworthy. Conspicuously absent from the list of thirteen respondents is comment from the California Regional Water Quality Control Board for the Los Angeles Region (LARWQCB). While the LARWQCB was included in the Office of Planning and Research distribution of the Notice of Preparation and Notice of Completion, the LARWQCB only responded to the former. This apparent failure to participate fully in the EIR process is additionally disconcerting because the LARWQCB was the only environmental oversight agency active in the CEQA process.[35] In addition, the LARWQCB received notice that they were the only environmental oversight agency participating in the project since the Office of Planning and Research informs each participant of all other responsible agencies' involvement.

Further, and possibly even more distressing, is the LARWQCB's apparent failure to address possible groundwater contamination issues. After all, a central aspect of the water quality control law is to protect groundwater resources. All one reasonably needs to do is to inspect the 1989 McLaren report to suspect that years of rain has caused the known contamination in the soil to percolate into the groundwater. Yet, there is no indication from the document trail of the LARWQCB ever discussing the subject with the LAUSD, much less requiring an assessment.

When asked about these issues, the LARWQCB responded by first retelling what is known from the document trail, that they responded to the NOP but not the FEIR. The reason given for not responding to the latter was:

> "After discussing this matter with members of my staff, it is my understanding that no comments were provided since the Draft EIR contained statement that the removal of the underground storage tanks and any needed remediation activities would be done under the direction of the City of Los Angeles Fire Department.

[35] The LAUSD contends that the Los Angeles City Fire Department be considered an environmental oversight agency. This opinion is not shared by Cal/EPA or DTSC.

> The Draft EIR also clearly states that with respect to Significance to Mitigation: Less than significant. Contaminated soils will be remediated, and old wells will be re-abandoned and storage tanks removed per current safety standards. Mitigation measures specified in the report included soil remediation and underground storage tank (UST) removal reviewed and approved by the City of Los Angeles Fire Department's Underground Storage Tank Unit which is a duly authorized Local Implementing Agency that conducts UST remediation with oversight by this Regional Board."[36]

The LARWQCB's response fell short of the Committee's inquiry. The Committee specifically asked three questions. Questions two and three were:

> "(2) Did your office discuss issues of groundwater assessment considering the known problems at the site?
> "(3) If such a conversation about groundwater took place, why did your office not require a groundwater assessment?"

The LARWQCB failed to answer the Committee's questions, leaving these issues outstanding for the moment.

Why did the LARWQCB allow themselves to be seen as the lone Responsible Agency for environmental concerns when it was clear from existing assessments that a known issues at the BLC was soil contamination? Stated simply, the LARWQCB does not have the scientific expertise to manage soil contamination issues. Furthermore, it seems curious that the LARWQCB would not, themselves, contact the DTSC.

It appears that both LAUSD and LARWQCB officials did not address the groundwater question. It must be noted that the cost of the necessary equipment to conduct

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[36] Letter from D. Dickerson to S. Wildman, February 4, 1999.

groundwater cleanup can range between ten and twenty million dollars just for start-up, and cleanup programs like this can run for years with additional costs in the millions of dollars. The following letter from the LAUSD's Environmental Assessment Coordinator, Richard Lui, and the LARQCB's Paul Cho, dated January 6, 1998 articulated the agreement between these two agencies:

> "Enclosed are the analytical results for a 1,600 cubic yard soil stockpile at the Belmont Learning Complex.
>
> "The Results of the analysis indicate that the contaminant resembles that of crude oil, which is consistent with the site being located near the Los Angles Oil Field. Due to cost considerations, eight out of the sixteen samples were analyzed. The Los Angeles Unified School District (District) feels that the analysis of the eight samples adequately characterizes the stockpile, thereby eliminating the need for additional analysis.
>
> "In the interest of saving tax dollars and since it has been confirmed that the contaminant is crude oil [sic], the District is requesting analysis of future samples in the area of concern be limited to analysis for Total Recoverable Petroleum Hydrocarbons (EPA Method 418.1). In speaking to Rod Nelson from your office on January 5, 1998, this approach was agreed upon. Mr. Nelson also indicated that the sampling frequency would be reduced based on the volume of the soil that was excavated. Please inform me of the allowable change(s) in sampling frequency and indicate this on our permit for waste discharge."

What could be the justification for an *inverse* ratio of sampling based on volume? What exactly is the "area of concern?" Why is the LAUSD allowed to change state sanctioned remediation protocol? These questions among others emerge.

<u>Certification of Final Environmental Impact Report</u>

Once a lead agency has concluded the FEIR, it must then have that EIR approved by the lead agency's decisionmaking body. According to Section 15090 of the CEQA Guidelines:

> "15090 (a) Prior to approving a project the lead agency shall certify that:
>
> > "(1) The final EIR has been completed in compliance with CEQA;
> >
> > "(2) The final EIR was presented to the decision making body of the lead agency and that the decisionmaking body reviewed and considered the information contained in the final EIR prior to approving the project; and
> >
> > "(3) The final EIR reflects the lead agency's independent judgment and analysis.
> >
> > "(b) When an EIR is certified by a non-elected decision-making body within a local lead agency, that certification may be appealed to the local lead agency's elected decision-making body, if one exists. For example, certification of an EIR for a tentative subdivision map by a city's planning commission may be appealed to the city council. Each local lead agency shall provide for such appeals."

Pursuant to subdivision (b) of that section of the guidelines, interested parties at the time of the FEIR certification process did generate the following appeal from the law offices of Greenberg, Glusker, Fields, Claman & Machtinger LLP (GGFCM):

> "In anticipation of your consideration of the certification of the above referenced Final Environmental Impact Report (the FEIR), this package will address identified deficiencies in the FEIR and the proposed Findings of Fact and Statement of Overriding Considerations (the "Findings"). While technical

perfection is not required in an EIR, the relevant standard is adequacy, completeness and a good faith effort at full disclosure. Rio Vista Farm Bureau Center v. County of Solano, 5 Cal.App.4th 351 (1992). The FEIR falls short of that standard. The FEIR is , for the most part, conclusory in its approach, lacking the "analytic bridge" of the quantitative data and statistics supporting its conclusions as required by the California Environmental Quality Act ("CEQA").

GGFCM discusses ten areas of concern that include the issue of methane mitigation. It is critical to remember that: (a) methane is not just a problem of explosion but also serves as a catalyst for bringing such toxic gasses to the surface as benzene and (b) this dual risk of methane was discussed above in earlier court records and most recently by the DTSC.

Concerning this issue, GGFCM states:

"The FEIR acknowledges that the "project site lies within a high-potential risk zone for gas seepage," but defers the determination as to the appropriate mitigation measures, notwithstanding the fact that the Division of Oil and Gas [Division of Oil , Gas and Geothermal Resources] ("DOG") has urged 'that the Final Environmental Impact Report (FEIR) includes a detailed plan for managing any buildup of reservoir pressure' as well as monitoring and well maintenance. The FEIR defers the formulation of mitigation measures to the 'development processing phase of the project' in violation of well-established CEQA law."

GGFCM concludes their comments with the following:

"Inadequate Responses to Comments. CEQA Guidelines § 15088 mandates the standard for legally sufficient responses to public comments as follows: 'There must be good faith reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice.' Counter to this edict, the tone of the EIR responses are dismissive and curt."

"Failure to Conduct a Public Hearing on the FEIR. The perception that the FEIR and the Findings circumvent CEQA by summarily rejecting the contrary views of government agencies and the public is perpetuated by the lack of a public hearing on the FEIR. Given the magnitude of the scarce education dollars, which are at stake, the certification of the FEIR, is a significant matter meriting extensive public scrutiny and input. Limiting the public discussion of a decision of this significance defies the spirit and intent of CEQA."

"To summarize, the FEIR fails to cure the host of deficiencies previously identified in the DEIR, and those deficiencies as adopted in the Findings. Accordingly, significant amplification of the existing FEIR to properly set forth the items in the attached correspondence must be undertaken prior to its certification as an adequate disclosure document under CEQA."[37]

One of the attached pieces of correspondence referred to above is a letter from the law firm of Hill, Farrer & Burrill LLP. This letter revisits some of the same arguments discussed above, but then concludes with the following:

"This approach to mitigation [of postponing a detailed plan until later] does not comport with the spirit of CEQA and has [been] specifically rejected by the courts. The District [LAUSD] is legally obligated to prepare its plan before it certifies the EIR so that it knows the efficacy of the mitigation. How can the District know that the mitigation plan will mitigate the environmental effects of methane seepage (not to mention the risks to school children from 'explosions or fire') if it does not have a plan or study that tells the District what will be done?

[37] Letter from E. Watson to Los Angeles City Board of Education, November 18, 1996.

"Moreover, the District itself has no apparent expertise in the area of controlling methane seepage in a depressurizing oil filed. How can the District therefore adopt an EIR that claims the risks of methane gas seepage will be mitigated by a future plan? At least in the public record there is no expert report that so opines and the subject does not appear within the expertise of the member of the School Board.

"This is precisely why the law requires exactly what the DOG recommended: That the plan for dealing with the methane gas seepage be included in the EIR so that the Board [Los Angeles City Board of Education] and the Public will have that information before them in making a fully informed decision about the environmental effects of the project. To date, the District has refused to comply with this aspect of the law."[38]

The above letter suggests that both the LAUSD's Board and their General Counsel were aware of evidence of the environmental problems posed to the BLC by methane – a problem that was central to the alarming November 1998 report by the DTSC and the 1989 McLaren report.

In further support of the argument that the board can not claim ignorance on this matter are the following selections from the November 18, 1996, board meeting where the certification of the FEIR was discussed prior to the vote:

"Thank you, Mr. President, Board Members. My Name is Richard Baker. Just coincidentally, I am the District Deputy of the Division of Oil and Gas, Department of Conservation, part of the State of California.

[38] Letter to Los Angeles City Board of Education , from D. Dennis, November 15, 1996.

"My reason for being here today is kind of just to make sure that you're aware of our position on [this project]. For one thing, we are neither pro nor con on this development. We're only here, or I should say, the Division's role in this EIR process is as a responsible agency to advise the Board regarding various oil and gas issues related to building a school in an oil field.

"When the last EIR [DEIR], the last one we have is dated July, was reviewed by our office, I thought we had an agreement on all the overall safety plans that we had talked about in previous meetings. It seems to me that the Board did understand the problems related to reservoir repressurizing and that they understood the need to keep them all producing wells, active producing wells pumping. However, recently, I've been approached by several members, I guess staff members from your Board of Education, with the request that they now would like to abandon one of the active oil wells as opposed to retain it. I have expressed to them that we still have not changed our mind regarding the opinion that we would like to keep all the active wells pumping.

"I've also been made aware, and you can correct me if I'm wrong, that there is a newer EIR [FEIR] than the July EIR which the Division hasn't had a chance to look at yet. I have no idea why we haven't seen the newer one yet. I was faxed a few pages of the newer version by someone. One of the problems I found with the pages I got was that it said that the Board or staff were going to be in negotiations or were in negotiations with the Division on removing this well. Since I am the Division in Long Beach and I didn't even know I was in negotiations, that kind of bothered me a little bit. I was concerned that there were other things in the newer EIR that might be a problem we should really look at before approving the final EIR.

"Therefore, in light of these changes that I've been made aware of just recently, I would request that you postpone the certification of the final EIR until we can put

to bed some of these important safety issues. We, the Division, feel that reservoir repressuring and all the different things that go along with building in an oil field need to be resolved before construction begins."

Despite Mr. Baker's concerns, the board voted later that meeting to certify the FEIR as follows:

| YES | NO |
|---|---|
| Barbara Boudreaux | Julie Korenstein |
| Victoria Castro | David Tokofsky |
| George Kiriyama | |
| Mark Slavkin | |
| Jeff Horton | |

While CEQA does not require FEIR public hearings to facilitate public input, such hearings are encouraged(see Sec. 15201, guidelines). Arguably, when CEQA's encouragement is combined with a lead agency such as a school district, the appropriateness of public discourse when considering a FEIR is clear. However, when the FEIR was discussed before the LAUSD's Board of Education, it was initiated with the following dialogue:

Jeff Horton [Board President]: "Welcome to the Board, Ms. Res."

Barbara Res: "We learned through an inquiry made today that there is a procedure whereby we can request a little additional time than the three minutes per speaker. We were told that it's up to the Board. So I would like to ask if we could have just a little bit more additional time to make a short presentation."

Jeff Horton: "What is the" –

Rubin Zacarias [Superintendent of Schools]: "Three minutes."

Jeff Horton: "Well, I mean it is the Board's rule, but we like to stick to the three minute. I mean, everybody has the same amount."

Barbara Res: "We specifically inquired if we could make some kind of presentation, if we could have a few more minutes."

Jeff Horton: "Well"–

Barbara Res: "We were told that it is up to the Board. If the Board wants to give us a little bit more time, the Board has the ability to do that. So, we are asking if the Board will give us a few extra minutes. I'm not looking for a half-hour. Generally, EIR hearings are separate and distinct hearings that are devoted for the purpose of the EIR and nothing else, and time limitations are not generally imposed. CEQA doesn't limit you from doing that but it does encourage free lengthy hearings. You chose not to do that, but you do have this waiver in the Board rules and I'm requesting that you consider giving us a few extra minutes."

Jeff Horton: "Well, we will stick with the three-minute time limit. Only we will do you the courtesy of starting your time with the substance of your remarks. So if we could start the time over now, we won't count that time."

CEQA does encourage an open process of public involvement. Section 15201 of the Guidelines states, in part:

"15201. Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and

procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities."[39]

Specifically, the proceeding section of the guidelines, Section 15200, requires that public review include the act of "discovering public concerns." It is arguable, based on the above, that the LAUSD failed in its responsibilities to satisfy not only the letter but the intent of the law as well.

The above EIR process contains significant inaccuracies. To say that toxic hazards 'will be remediated' arguably implies a certain degree of substantive knowledge. Is there not more implied by a promise of a future plan than hope of success – especially in the context of laws that require such a plan at the time the promise is being made? For instance, when an observer is told by those who represent themselves as being the experts that a plan will be soon drafted, that observer has a reasonable expectation that such promises are based on something more substantive than hope. Is it reasonable that such a promise for a plan would require $50 million in costs? Is it reasonable, for instance, that such a plan would add an extra five years to construction? It would appear that a reasonable person would answer no to both questions. Therefore, in order for an expert to make statements that a plan is forthcoming, it is reasonable to expect that these "expert" statements are based on substantive supporting evidence.

To observe this notion of reasonable expectation in action, one need go no further than the same LAUSD board meeting as quoted above where the FEIR was discussed and approved. At one point during the meeting, board member Kiriyama stated:

"And the bottom line is this: Cost and Safety. And you were saying, Barbara, that it's going to cost $250 million. There's no way. I mean, I don't think anyone up

[39] Authority cited: Sections 21083 and 21087, Public Resources Code. Reference: Sections 21000, 21082, 21108 and 21152, Public Resources Code; Environmental Defense Fund v. Coastside County Water District

here will accept that figure and let it go past as building a school. Another thing too, the bottom line actually is it safe for the children? **And if the Environmental Impact Report states that it is safe and there is no significant impact on sewage, police, fire, you name it, then I think this is a project worthwhile going for.**

"So that I think when you look at our particular exhibit finding, the fact and statement that we have in our hands – and I hope you have looked at it because , you know, if you have not, then I think this is where you're getting misinformation, and to me this is what we have to rely on, and were asking the staff: Is it true? And they say its true then I have to believe it is true. And so if it is not true, then we have to go back and look at it. All right, this is what I'm saying."

From the above, it appears that the LAUSD board considered the FEIR to be truthful in all respects. The board had a reasonable expectation that the FEIR's statement that plans would be drafted as-you-go reasonably assumed a base of factual knowledge that supported reasonable cost and time issues.

Another example of the same process is a November 18, 1992, Report of the Executive Officer, State Allocation Board. This is the administrative body that makes the final determination as to who is eligible for state school construction funds. Speaking about what would become the BLC's eleven-acre site, the State Allocation Board concluded that:

"The State Allocation Board [initially] approved the site for purchase after mitigation of the reported toxic conditions. The site was believed to have had a toxic/hazardous condition and the State Allocation Board, following its policy, apportioned funds contingent on no monies being released until mitigation had

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(1972) 27 Cal. App. 3d 695; People v. County of Kern (1974) 39 Cal. App. 3d 830; County of Inyo v. City of Los Angeles (1977) 71 Cal. App. 3d 185.

taken place within the 14 month period allowed. [The SAB now understands that t]he site in question does not qualify as toxic or hazardous, but rather the conditions present are due to a naturally occurring substance."

The memo then quotes the Comprehensive Environmental Response, Compensation, and Liability Act that excludes crude oil from the state's official list of "hazardous substances." The memo then goes on to say:

"Since mitigation does not require the removal of either a foreign substance and/or dirt, a more accurate cost to cure can be ascertained. Mitigation in this instance simply requires locating existing wellheads and subsequently filling the well with cement, i.e., abandonment."

It appears that someone within the LAUSD was less than completely forthcoming with the SAB. How could any reasonable person say that "The site in question does not qualify as toxic or hazardous" or that "mitigation does not require the removal of either a foreign substance and/or dirt?" The LAUSD may have known about the serious problems at the site at least three years prior to this memo, yet did not report as much to the State Allocation Board.

The FEIR certification meeting suggests that at best the LAUSD officials satisfied only the minimum letter of the law rather than striving to satisfy the full intent of the law. When asked why the Division of Oil, Gas, and Geothermal Resources did not receive a copy of the FEIR despite that concern expressed throughout the process and the LAUSD's characterization of their relationship as "in negotiations," Mr. Niccum responded:

"The District's practice conforms with the statute which governs the Environmental Impact Reports which is the California Environmental Quality Act or CEQA and the guidelines that the state has implemented or has promulgated to

implement CEQA, and that statute and those guidelines provide that once an agency has received comments on an Environmental Impact Report, it is obligated to respond to those comments, to those agencies such as D.O.G. who have made those comments and provide copies of those responses not only to Board members, which you have before you, but provide copies of those responses to the agency prior to the action of the board that's going to make the decision.

And I believe that you heard Mr. Baker say that he did receive some materials from the District, and what he received was what the law requires and provides for, and that is our response to the comments that he made. The law makes no provision for and we do not, absent a specific request for the later version of the document."[40]

An underlining theme within CEQA law is that the process should "afford the fullest possible protection" of the environment's health – including the humans who will live and work in that environment. There was controversy surrounding gas seepage and the District failed to fully communicate its CEQA plans with the very agency it claims was assisting them in their efforts to confront this controversy. However the subject is framed, it is arguable that the LAUSD failed in its responsibility properly perform applicable duties.

Findings

To prevent the type of problems described above, CEQA requires the lead agency to issue two sets of findings for each significant adverse impact to ensure that the decision making agency actually considers alternatives and mitigation measures."[59] The lead agency must make the ultimate finding called for in Section 21081 of the Public Resource Code, which states:

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[40] LAUSD November 18, 1996, Board Meeting, BLC EIR.

[59] Ominda Ass. V. Board of Supervisors (182 Cal. App.3d 1145), p. 1169, fn. 13.

"21081. Pursuant to the policy stated in Sections 21002 and 21002.1 [of the Public Resource Code], no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

"(a) The public agency makes one or more of the following findings with respect to each significant effect:

"(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

"(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.

"(3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

"(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment."

What the LAUSD may have done is classify toxic hazards as "to be mitigated" to avoid characterization as "significant." The problem with this approach is that mitigating a "significant effect" into an effect that is "less than significant" is exactly what this process is intended to provide – under oversight.

The FEIR closes the "Hazards" section with the following:

**"LEVEL OF SIGNIFICANCE AFTER MITIGATION**

> Implementation of mitigation measures together with all applicable federal, state, and local regulations will reduce hazards to current safety levels, that is to a less than significant level."

Instead of working through this issue by way of CEQA's Findings requirement, the LAUSD arguably avoided requirements that would have prevented them from approving an FEIR without specific remediation plans.

According to the guidelines, the lead agency cannot delegate their responsibility to satisfy CEQA's requirement for Findings.[41]

The reason why it is important to bring together "the environmental evaluation and the decision on the project" is best explained in the California Supreme Court decision in Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 516-517, wherein it is explained:

> "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant subconclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that agencies will randomly leap from evidence to conclusions. In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis.
>
> * * *
>
> ". . . Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review.

[41] California Code of Regulations, Title 14, § 15025, subd. (b)(2).

They also serve a public relations function by helping to persuade the parties that administrative decisionmaking is careful, reasoned, and equitable."

It appears that the above LAUSD board meeting discussed above, where the FEIR was approved, may not have followed appropriate guidelines.

Mitigation Reporting and Monitoring Program

Subdivisions (a) and (b) of Section 21081.6 of the Public Resources Code states that:

"(a) When making the findings required by paragraph (1) of subdivision (a) of Section 21081 or when adopting a mitigated negative declaration pursuant to paragraph (2) of subdivision (c) of Section 21080, the following requirements shall apply:

(1) The public agency shall adopt a reporting or monitoring program for the changes made to the project or conditions of project approval, adopted in order to mitigate or avoid significant effects on the environment. **The reporting or monitoring program shall be designed to ensure compliance during project implementation**. For those changes which have been required or incorporated into the project at the request of a responsible agency or a public agency having jurisdiction by law over natural resources affected by the project (trustee agency), that agency shall, if so requested by the lead agency or a responsible agency, prepare and submit a proposed reporting or monitoring program.

"(2) The lead agency shall specify the location and custodian of the documents or other material which constitute the record of proceedings upon which its decision is based.

"(b) A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures. Conditions of project approval may be set forth in

referenced documents which address required mitigation measures or, in the case of the adoption of a plan, policy, regulation, or other public project, by incorporating the mitigation measures into the plan, policy, regulation, or project design.

If a lead agency is attempting to avoid oversight, it is easy to see why it would want to avoid the requirement of Findings altogether. Yet, such a monitoring and reporting plan, which Findings would have generated, might have very well prevented the BLC from being built on toxically hazardous soil.

Statement of Overriding Considerations

Section 15093 of the CEQA Guidelines states the following:

"15093 (a) CEQA requires the decision-making agency to balance, as applicable, the economic, legal, social, technological, or other benefits of a proposed project against its unavoidable environmental risks when determining whether to approve the project. If the specific economic, legal, social, technological, or other benefits of a proposal project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered 'acceptable'.

(b) When the lead agency approves a project which will result in the occurrence of significant effects which are identified in the final EIR but are not avoided or substantially lessened, the agency shall state in writing the specific reasons to support its action based on the final EIR and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record.

(c) If an agency makes a statement of overriding considerations, the statement should be included in the record of the project approval and should be mentioned in the notice of determination. This statement does not

substitute for, and shall be in addition to, findings required pursuant to Section 15091 of the Guidelines."

Since the LAUSD reduced all impacts to "less than significant", there were no Statements of Overriding Considerations associated with the BLC EIR.

## CONCLUSIONS

It appear, based on the above analysis, that:

- The LAUSD was first made aware of the toxic problems at the BLC site as early as 1989;
- The LAUSD failed to "adequately characterize" the BLC despite these known problems;
- The LAUSD may have violated the Education Code by seeking State approval of the BLC site prior to ensuring "that the wastes have been removed;"
- The LAUSD may have violated the Health and Safety Code by failing to contact the DTSC prior to construction when they had "probable cause to believe" the land was contaminated;
- Due to LAUSD's failing to adhere to the Health and Safety Code, the state may "pursue feasible civil and criminal actions against" offending individuals;
- The LAUSD appears to have violated their own CEQA guidelines;
- The LAUSD appears to have failed to satisfy many aspects of the California Code of Regulations that govern the CEQA process;

**APENDIX A**

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Sacramento, California
February 8, 1999

Honorable Scott Wildman
3091 State Capitol

Schoolsite Acquisition and Construction:
Hazardous Substance Contamination - #157

Dear Mr. Wildman:

You have asked us to discuss the statutory duties imposed upon a school district planning to acquire property for a schoolsite, or to construct a school upon a site, that is contaminated with a release of a hazardous waste or hazardous substance as a result of former industrial activity on that site. You have asked us to discuss how property acquired by a school district by eminent domain is valued if the property is contaminated with a hazardous substance or hazardous waste release. You have also asked us to discuss the effective dates of those statutes.

Various statutes impose duties upon school districts when acquiring property for a schoolsite, or planning to construct a school upon such a site, that is contaminated with a hazardous waste or a hazardous substance from former industrial activity conducted on the site. A discussion of those statutes follows.

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The California Environmental Quality Act/Sections 17213 and 17268 of the Education Code

The California Environmental Quality Act (hereafter CEQA) is contained in Division 13 (commencing with Section 21000) of the Public Resources Code. Among other things, CEQA requires state and local governmental entities to prepare an environmental impact report (hereafter an EIR) before undertaking any discretionary project that may have a significant effect on the environment (Secs. 21080, 21100, and 21150, P.R.C.). "These [environmental impact] reports compel state and local agencies to consider the possible adverse consequences to the environment of the proposed activity and to record such impact in writing" (Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 254-255).

For the purposes of CEQA, "project" is defined as an activity that may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, and is either an activity directly undertaken by any public agency, an activity undertaken by a person that is supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies, or an activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies (Sec. 21065, P.R.C.). "Public agency" includes, for this purpose, any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision (Sec. 21063, P.R.C.). A negative declaration is a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an EIR (Sec. 21064, P.R.C.).

Under CEQA, the lead agency is the public agency that has the principal responsibility for carrying out or approving a project that may have a significant effect upon the environment (Sec. 21067, P.R.C.). Section 21151.8 of the Public Resources Code expressly imposes various duties upon the lead agency for a project involving the purchase of a schoolsite or the construction of a new elementary or secondary school, as follows:

> "21151.8. (a) No environmental impact report or negative declaration shall be approved for any project involving the purchase of a schoolsite or

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the construction of a new elementary or secondary school by a school district unless all of the following occur:

"(1) The environmental impact report or negative declaration includes information which is needed to determine if the property proposed to be purchased, or to be constructed upon, is any of the following:

"(A) The site of a current or former hazardous waste disposal site or solid waste disposal site and, if so, whether the wastes have been removed.

"(B) A hazardous substance release site identified by the State Department of Health Services [Department of Toxic Substances Control; see the Governor's Reorganization Plan No. 1 of 1991, effective July 17, 1991] in a current list adopted pursuant to Section 25356[1] for removal or remedial action pursuant to Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.

"(C) A site which contains one or more pipelines, situated underground or aboveground, which carries hazardous substances, acutely hazardous materials, or hazardous wastes, unless the pipeline is a natural gas line which is used only to supply natural gas to that school or neighborhood.

"(2) The lead agency preparing the environmental impact report or negative declaration has notified in writing and consulted with the administering agency in which the proposed schoolsite is located, and with any air pollution control district or air quality management district having jurisdiction in the area, to identify facilities within one-fourth of a mile of the

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[1] Section 25356 of the Health and Safety Code, which was a part of the Carpenter-Presley-Tanner Hazardous Substance Account Act (Ch. 6.8 (commencing with Sec. 25300), Div. 20, H.& S.C.), was repealed January 1, 1999 (subd. (b), Sec. 25395, H.& S.C.). That section required the Department of Toxic Substances Control to annually publish and revise a list of hazardous substance release sites subject to that act (see also footnote 6).

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proposed schoolsite which might reasonably be anticipated to emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste. The notification by the lead agency shall include a list of the locations for which information is sought.

"(3) The governing board of the school district makes one of the following written findings:

"(A) Consultation identified no such facilities specified in paragraph (2).

"(B) The facilities specified in paragraph (2) exist, but one of the following conditions applies:

"(i) The health risks from the facilities do not and will not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school.

"(ii) Corrective measures required under an existing order by another agency having jurisdiction over the facilities will, before the school is occupied, result in the mitigation of all chronic or accidental hazardous air emissions to levels that do not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school. If the governing board makes such a finding, it shall also make a subsequent finding, prior to occupancy of the school, that the emissions have been so mitigated.

"(4) Each administering agency, air pollution control district, or air quality management district receiving written notification from a lead agency to identify facilities pursuant to paragraph (2) shall provide the requested information and provide a written response to the lead agency within 30 days of receiving the notification. The environmental impact report or negative declaration shall be conclusively presumed to comply with this section as to the area of responsibility of any agency which does not respond within 30 days.

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"(b) If a lead agency has carried out the consultation required by paragraph (2) of subdivision (a), the environmental impact report or the negative declaration shall be conclusively presumed to comply with this section, notwithstanding any failure of the consultation to identify an existing facility specified in paragraph (2) of subdivision (a).

"(c) As used in this section and Section 21151.4, the following definitions shall apply:

"(1) 'Hazardous substance' means any substance defined in Section 25316 of the Health and Safety Code.

"(2) 'Acutely hazardous material' means any material defined pursuant to subdivision (a) of Section 25532[2] of the Health and Safety Code.

"(3) 'Hazardous waste' means any waste defined in Section 25117 of the Health and Safety Code.

"(4) 'Hazardous waste disposal site' means any site defined in Section 25114 of the Health and Safety Code.

"(5) 'Hazardous air emissions' means emissions into the ambient air of air contaminants which have been identified as a toxic air contaminant by the State Air Resources Board or by the air pollution control officer for the jurisdiction in which the project is located. As determined by the air pollution control officer, hazardous air emissions also means emissions into the ambient air from any substances identified in subdivisions (a) to (f),

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[2] A prior version of Section 25532 of the Health and Safety Code defined the term "acutely hazardous material" (see Sec. 25532, H.& S.C., as added by Ch. 1260, Stats. 1986). However, Section 25532 was repealed by Chapter 715 of the Statutes of 1996 and a new version of Section 25532 was added to the Health and Safety Code by that same act to define various terms, including the term "regulated substances" (subd. (g), Sec. 25532, H.& S.C.).



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inclusive, of Section 44321[3] of the Health and Safety Code.

"(6) 'Administering agency' means an agency designated pursuant to Section 25502[4] of the Health and Safety Code.

"(7) 'Handle' means handle as defined in Article 1 (commencing with Section 25500) of Chapter 6.95 of Division 20 of the Health and Safety Code."

Thus, the lead agency is prohibited from approving the EIR or negative declaration for a project involving the acquisition of a schoolsite or the construction of a new elementary or secondary school unless, among other things, the EIR or negative declaration includes information that is needed to determine if the property proposed to be purchased, or to be constructed upon, (1) is the site of a current or former hazardous waste disposal site or solid waste disposal site and, if so, whether the wastes have been removed, or (2) was a hazardous substance release site identified by the Department of Toxic Substances Control (hereafter the department) in a list adopted prior to January 1, 1999, pursuant to former Section 25356 of the Health and Safety Code[5] for removal or remedial action pursuant to the Carpenter-Presley-Tanner Hazardous Substance Account Act (Ch. 6.8 (commencing with Sec. 25300), Div. 20; hereafter the hazardous

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[3] Section 44321 of the Health and Safety Code requires the State Air Resources Board to compile and maintain a list of substances for purposes of the Air Toxics "Hot Spots" Information and Assessment Act of 1987 (Pt. 6 (commencing with Sec. 44300), Div. 26, H.& S.C.).

[4] An administering agency, for purposes of Section 25502 of the Health and Safety Code, is the unified program agency that is certified by the Secretary for Environmental Protection under the Unified Hazardous Waste and Hazardous Materials Management Regulatory Program (Ch. 6.11 (commencing with Sec. 25404), Div. 20, H.& S.C.), or, if there is no unified program agency, the agency authorized pursuant to subdivision (f) of Section 25404.3 of the Health and Safety Code, pursuant to that program.

[5] All further section references are to the Health and Safety Code, unless otherwise indicated.

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substance act;[6] subparas. (A) and (B), para. (1), subd. (a), Sec. 21151.8, P.R.C.).

The requirements imposed by Sections 17213 and 17268 of the Education Code are essentially the same as those imposed by

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[6] On January 1, 1999, the Department of Finance was required to submit a report to the Secretary of State that states whether the principal of, and interest on, the bonds sold pursuant to the hazardous substance act have been paid and the General Fund reimbursed for any amounts that were expended therefrom to pay the principal of, and interest on, those bonds, and, if the report states that the bonds have not been paid and the General Fund has not been reimbursed, the provisions of the hazardous substance act specified in subdivision (b) of Section 25395 are not repealed and instead remain in effect until the date the bonds sold have been paid and the General Fund has been reimbursed (subds. (b) and (c), Sec. 25395). The department is responsible for paying the principal of, and interest on, the bonds issued and sold pursuant to the hazardous substance act (subd. (a), Sec. 25385.1 and Sec. 25385.9; subd. (c), Sec. 16722, Gov. C.). The department has submitted to us a bond repayment schedule dated August 7, 1997, showing that the bonds are anticipated to be paid as of December 1, 2005.

Thus, because the bonds have not been repaid, certain portions of the hazardous substance act were not repealed on January 1, 1999 (subd. (a), Sec. 25395), namely, Article 1 (commencing with Section 25300) containing statements of legislative intent, Article 2 (commencing with Section 25310) containing various definitions, Article 3 (commencing with Section 25330) providing for the Hazardous Substance Account, Article 4 (commencing with Section 25340) regarding preliminary endangerment oversight costs, Article 6 (commencing with Section 25360) pertaining to recovery actions, Article 7.5 (commencing with Section 25385) containing the Johnston-Filante Hazardous Substance Cleanup Bond Act of 1984, and Article 8 (commencing with Section 25395) containing miscellaneous provisions (subds. (b) and (c), Sec. 25395). However, in accordance with subdivision (a) of Section 25395, other provisions of the hazardous substance act were repealed on January 1, 1999, namely, Article 5 (commencing with Section 25350) prescribing various uses of funds in the Toxic Substances Control Account, Article 6.3 (commencing with Section 25368) providing for a technology demonstration program, Article 6.5 (commencing with Section 25369) relating to the abandoned site program, Article 7 (commencing with Section 25370) providing for compensation, and Article 9 (commencing with Section 25395.1) relating to private site management.

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Section 21151.8 of the Public Resources Code. Sections 17213 and 17268 of the Education Code read as follows:

"17213. The governing board of a school district shall not approve a project involving the acquisition of a schoolsite by a school district unless all of the following occur:

"(a) The lead agency, as defined in Section 21067 of the Public Resources Code, determines that the property purchased or to be built upon is not any of the following:

"(1) The site of a current or former hazardous waste disposal site or solid waste disposal site unless, if the site was a former solid waste disposal site, the governing board of the school district concludes that the wastes have been removed.

"(2) A hazardous substance release site identified by the State Department of Health Services [Department of Toxic Substances Control] in a current list adopted pursuant to Section 25356 for removal or remedial action pursuant to Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.

"(3) A site which contains one or more pipelines, situated underground or aboveground, which carries hazardous substances, acutely hazardous materials, or hazardous wastes, unless the pipeline is a natural gas line which is used only to supply natural gas to that school or neighborhood.

"(b) The lead agency, as defined in Section 21067 of the Public Resources Code, preparing the environmental impact report or negative declaration has consulted with the administering agency in which the proposed schoolsite is located and with any air pollution control district or air quality management district having jurisdiction in the area, to identify facilities within one-fourth of a mile of the proposed schoolsite which might reasonably be anticipated to emit hazardous air emissions, or to handle hazardous or acutely hazardous materials, substances, or waste. The lead agency shall include a list of the locations for which information is sought.

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"(c) The governing board of the school district makes one of the following written findings:

"(1) Consultation identified none of the facilities specified in subdivision (b).

"(2) The facilities specified in subdivision (b) exist, but one of the following conditions applies:

"(A) The health risks from the facilities do not and will not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the school.

"(B) The governing board finds that corrective measures required under an existing order by another jurisdiction which has jurisdiction over the facilities will, before the school is occupied, result in the mitigation of all chronic or accidental hazardous air emissions to levels that do not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school. If the governing board makes this finding, the governing board shall also make a subsequent finding, prior to the occupancy of the school, that the emissions have been mitigated to these levels.

"(d) As used in this section:

"(1) 'Hazardous air emissions' means emissions into the ambient air of air contaminants which have been identified as a toxic air contaminant by the State Air Resources Board or by the air pollution control officer for the jurisdiction in which the project is located. As determined by the air pollution control officer, hazardous air emissions also means emissions into the ambient air from any substance identified in subdivisions (a) to (f), inclusive, of Section 44321 of the Health and Safety Code.

"(2) 'Hazardous substance' means any substance defined in Section 25316 of the Health and Safety Code.

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"(3) 'Acutely hazardous material' means any material defined pursuant to subdivision (a) of Section 25532 of the Health and Safety Code.

"(4) 'Hazardous waste' means any waste defined in Section 25117 of the Health and Safety Code.

"(5) 'Hazardous waste disposal site' means any site defined in Section 25114 of the Health and Safety Code.

"(6) 'Administering agency' means any agency designated pursuant to Section 25502 of the Health and Safety Code.

"(7) 'Handle' means handle as defined in Article 1 (commencing with Section 25500) of Chapter 6.95 of Division 20 of the Health and Safety Code."

"17268. (a) The governing board of a school district shall not approve a project for the construction of a new school building, as defined in Section 17283,[7] unless the project and its lead agency comply with the same requirements specified in subdivision (a) of Section 17213 for schoolsite acquisition.

"(b) For purposes of this section, the acceptance of construction bids shall constitute approval of the project."

As can be seen, Sections 17213 and 17268 of the Education Code impose requirements similar to those imposed by Section 21151.8 of the Public Resources Code. Like Section 21151.8 of the Public Resources Code, Sections 17213 and 17268 of the Education Code prohibit the approval of a project involving the acquisition of a schoolsite or the construction of a new

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[7] Section 17283 of the Education Code defines a "school building" as "any building used, or designed to be used, for elementary or secondary school purposes and constructed, reconstructed, altered, or added to, by the state or by any city or city and county, or by any political subdivision, or by any school district of any kind within the state, or by any regional occupational center or program created by or authorized to act by an agreement under joint exercise of power, or by the United States government, or any agency thereof."

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school building by a school district unless the lead agency determines that the site is not, among other things, (1) the site of a current or former hazardous waste disposal site or solid waste disposal site unless, if the site was a former solid waste disposal site, the governing board of the school district concludes that the wastes have been removed, or (2) a hazardous substance release site identified by the department in a list adopted prior to January 1, 1999, pursuant to former Section 25356 (compare subd. (a), Sec. 17213, Ed. C., and subd. (a), Sec. 21151.8, P.R.C.).

The hazardous substance act provides, in general, for the taking of removal and remedial action to hazardous substance release sites and, as discussed in footnote 1, former Section 25356 required the department to annually publish and revise a list of sites subject to the hazardous substance act.

Section 21151.8 of the Public Resources Code and Section 17213 of the Education Code both define a "hazardous waste disposal site," for purposes of the determination that the lead agency is required to make pursuant to subdivision (a) of each of those sections, as meaning any site defined in Section 25114, which is a part of Chapter 6.5 (commencing with Section 25100) of Division 20 (hereafter the hazardous waste control law) (para. (4), subd. (c), Sec. 21151.8, P.R.C.; para. (5), subd. (d), Sec. 17213, Ed. C.). Section 25114, in turn, defines a "disposal site" as "the location where any final deposition of hazardous waste occurs." The term "disposal" is defined by subdivision (a) of Section 25113 of the hazardous waste control law as meaning either of the following:

> "25113. (a) * * *
>
> "(1) The discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste so that the waste or any constituent of the waste is or may be emitted into the air or discharged into or on any land or waters, including groundwaters, or may otherwise enter the environment.
>
> "(2) The abandonment of any waste.
>
> * * *"

"Hazardous waste" is defined by Section 25117 of the hazardous waste control law as any waste that meets any of the criteria for the identification of hazardous waste adopted by the department pursuant to Section 25141, which requires the department to develop and adopt by regulation criteria and

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guidelines for the identification of hazardous waste (subd. (a), Sec. 25117; subd. (a), Sec. 25141). Thus, if property that is the former location of an industrial facility that discharged, spilled, or leaked a waste that is a hazardous waste is determined by a lead agency to be a hazardous waste disposal site, the governing board of a school district is prohibited from approving a project involving the acquisition of that property or the construction of a new school building unless the governing board concludes that the waste has been removed (para. (1), subd. (a), Sec. 17213, Ed. C.).

Furthermore, if the lead agency determined, prior to January 1, 1999, that the department had listed the property pursuant to former Section 25356, as that section provided on December 31, 1998, as needing removal or remedial action, the governing board of the school district was also prohibited prior to January 1, 1999, from approving a project involving the acquisition of a schoolsite or the construction of a new school building (para. (2), subd. (a), Sec. 17213, Ed. C.; subpara. (B), para. (1), subd. (a), Sec. 21151.8, P.R.C.).

Therefore, if the lead agency determines that an industrial facility discharged, spilled, or leaked any hazardous waste onto land that is a hazardous waste disposal site, or determined that that site is a hazardous substance release site that was listed pursuant to former Section 25356 prior to January 1, 1999, Section 21151.8 of the Public Resources Code and Sections 17213 and 17268 of the Education Code prohibit the approval of a project involving the acquisition of that land for a schoolsite or the construction of a new school building.

You have also asked us to discuss the dates when the requirements of Sections 17213 and 17268 of the Education Code and Section 21151.8 of the Public Resources Code went into effect.

Although Sections 17213 and 17268 were added to the Education Code by Chapter 277 of the Statutes of 1996, these sections derive from former Sections 39003 and 39120, respectively, which were added to the Education Code by Chapter 1602 of the Statutes of 1990 and which contained substantially the same requirements as existing law. Section 21151.8 was also added to the Public Resources Code by Chapter 1602 of the Statutes of 1990. Chapter 1602 of the Statutes of 1990 became effective January 1, 1991 (para. (1), subd. (c), Sec. 8, Art. IV, Cal. Const.). Accordingly, on and after January 1, 1991, the governing board of a school district was and is prohibited from approving a project involving the acquisition of a schoolsite, or approving a project for the construction of a new school building, if a lead agency determines the property is a current or former hazardous waste disposal site, except as



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specified, or determined, prior to January 1, 1999, that the site was a hazardous substance release site.

Article 11 (commencing with Section 25220) of Chapter 6.5 of Division 20

Article 11 (commencing with Section 25220) of Chapter 6.5 of Division 20 (hereafter Article 11) imposes deed and land use restrictions and notice requirements upon persons owning property used for the disposal of hazardous waste or property near hazardous waste property. The Director of Toxic Substances Control (hereafter the director) is authorized under Article 11 to designate as hazardous waste property that property where a significant disposal of hazardous waste has occurred on, under, or in the land, resulting in a significant existing or potential hazard to present or future health or safety (Secs. 25117.3 and 25229). The director may also designate as border zone property that property which is within 2,000 feet of a significant disposal of hazardous waste if the wastes so located are a significant existing or potential hazard to present or future public health or safety on the property (Secs. 25117.4, 25222, and 25229).

If the director determines that the land is hazardous waste property or border zone property, the owner of the property is required to execute and record a written instrument that imposes an easement, covenant, restriction, or servitude upon the land, containing a statement that the land is subject to a hazardous waste easement, covenant, restriction, or servitude (subd. (a), Sec. 25230). Once land has been designated as hazardous waste property, or a decision is pending, any new use of the land or a subdivision of the land, as specified, is generally prohibited unless the department issues a written variance (subd. (a), Sec. 25232). If the land has been designated as a border zone property, or that designation is pending, the construction or placement of a building or structure on the land, or the new use of an existing structure, for a residence, school, hospital, day care center, or permanently occupied human habitation, or a subdivision of the land, also generally may not occur without a written variance from the department (subd. (b), Sec. 25232).

Any aggrieved person may, upon a prescribed showing, apply to the department for a variance (Sec. 25233) or for the removal of the designation of the land as hazardous waste property or border zone property (Sec. 25234).

Any person who, as owner, lessor, or lessee "(1) knows, or has probable cause to believe, that a significant disposal of hazardous waste has occurred on, under, or into the land which he or she owns or leases or that the land is within 2,000 feet of a

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significant disposal of hazardous waste, and (2) intends to construct or allow the construction on that land of a building or structure to be used for a purpose which is described in subdivision (b) of Section 25232 within one year" is required to apply to the department prior to construction for a determination as to whether the land should be designated a hazardous waste property or a border zone property (subd. (a), Sec. 25221). Among the land uses that are subject to this requirement is construction or placement of a building or structure on the land that is intended for use as a school for persons under 21 years of age (subpara. (C), para. (1), subd. (b), Sec. 25232). Also, any person who, as owner, lessor, or lessee, "knows or has probable cause to believe that land which he or she owns or leases is a hazardous waste property, or a border zone property," may apply to the department for a determination as to whether the land should be designated a hazardous waste property or a border zone property (subd. (b), Sec. 25221).

Section 25221.1, which specifies the actions that the department is authorized to take upon receiving an application pursuant to Section 25221, reads as follows:

> "25221.1. Whenever the department receives an application pursuant to Section 25221, it may request information pursuant to Section 25220 to determine whether the land should be designated as hazardous waste property or border zone property. Upon evaluating all pertinent available information, the department may do any one or more of the following:
>
> "(a) Issue a statement that, based on existing documents and other information available to the department, there is no currently known hazard.
>
> "(b) Recommend to local land use authorities that they place a moratorium on any new land uses specified in paragraph (1) of subdivision (a) of Section 25232, if the department suspects that the land is hazardous waste property, or a moratorium on the construction or placement of any building or structure which is intended to be used for any of the purposes specified in paragraph (1) of subdivision (b) of Section 25232, if the department suspects that the land is border zone property.
>
> "(c) Collect additional information, including sampling, monitoring, and analytical data for the purpose of making a determination as to whether the land should be designated as hazardous waste

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property or border zone property pursuant to Section 25229.

"(d) Make a determination as to whether the land should be designated as hazardous waste property or border zone property pursuant to Section 25229.

"(e) Enter into an agreement pursuant to Section 25222.1."

Thus, Section 25221.1 provides that the department may request information pursuant to Section 25220 when it receives an application pursuant to Section 25221. Section 25220 authorizes the department, whenever there is a reasonable cause for the department to believe that any land may be a hazardous waste property or border zone property, to request certain information from the person who owns, leases, or occupies the land (subd. (b), Sec. 25220). Upon evaluating all pertinent available information, Section 25221.1 provides that the department may take one or more of the actions specified in subdivisions (a) to (e), inclusive, of that section.

A person is defined, for purposes of the hazardous waste control law, as including, among other things, a district (Sec. 25118). Thus a school district is subject to Section 25221, and if it owns property for which it knows, or has probable cause to believe, that a significant disposal of hazardous waste has occurred on, under, or into the land, or is within 2,000 feet of such a significant disposal, and intends to construct a school on that land within one year, subdivision (a) of Section 25221 requires the school district to apply to the department prior to construction for a determination as to whether the land should be designated as hazardous waste property or border zone property.

With respect to the date Article 11 became effective, that article, including Section 25221, was added to the Health and Safety Code by Chapter 1161 of the Statutes of 1980 and became effective January 1, 1981 (para. (1), subd. (c), Sec. 8, Art. IV, Cal. Const.). While there have been various changes to Article 11 since its enactment (see, for example, Ch. 165, Stats. 1982; Ch. 1736, Stats. 1984; Ch. 906, Stats. 1989; Ch. 1267, Stats. 1990), since January 1, 1981, there has been a duty imposed by Article 11 upon persons planning to construct certain facilities on, or within 2,000 feet of, hazardous waste property to notify the department. Thus, the duty to make an application to the department was imposed, on and after January 1, 1981, upon a school district that plans to build or construct a school located on property where the school district knows, or has probable cause to believe, that there has been a significant disposal of

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hazardous waste, or is within 2,000 feet of such a significant disposal.

Eminent Domain

The United States Constitution and the California Constitution require that just compensation be paid for the taking of private property for public use (5th Amdt., U.S. Const.; Sec. 19, Art. I, Cal. Const.; Redevelopment Agency v. Tobriner (1989) 215 Cal.App.3d 1087, 1098). Thus, the two constitutional restraints are that the taking be for a "public use" and that "just compensation" be paid therefor (Ibid.). Both of these limitations create a justiciable issue in eminent domain proceedings, but all other questions involved in the taking of private property are of a legislative nature (People v. Chevalier (1959) 52 Cal.2d 299, 304). Because the power to condemn private property for public use is an inherent attribute of sovereignty, it has been held that the "'constitutional provisions merely place limitations upon its exercise'" (City of Oakland v. Oakland Raiders (1982) 32 Cal.3d 60, 64).

Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure (hereafter Title 7) sets forth the statutory requirements applicable to the acquisition of property by eminent domain. Section 1240.020 of Title 7 provides that the power of eminent domain may be exercised for a particular use only by a person authorized by statute to acquire property for that use.

Section 35270.5 of the Education Code provides that the governing board of a school district is authorized to acquire by eminent domain any property necessary to carry out any of the powers or functions of the school district.

The power of eminent domain may be exercised to acquire property for a proposed project only if it is established that (1) the public interest and necessity require the project, (2) the project is planned or located in a manner that will be most compatible with the greatest public good and the least private injury, and (3) the property sought to be acquired is necessary for the project (Sec. 1240.030, C.C.P.).

A public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity that meets the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4 of Title 7 (Sec. 1240.040, C.C.P.; see also Sec. 1245.220, C.C.P.). The resolution of necessity is required to contain, among other things, specified information supporting its findings in favor of the adoption of the resolution of necessity (Sec. 1245.230, C.C.P.). In addition, the governing board of a

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public entity is authorized to adopt a resolution of necessity only after it has given each person whose property is to be acquired reasonable opportunity to appear and be heard on the matters relating to the adoption of the resolution of necessity (Sec. 1245.235, C.C.P.).

Unless a greater vote is required by statute, charter, or ordinance, the resolution of necessity must be adopted by a vote of two-thirds of all the members of the governing body of the public entity (Sec. 1245.240, C.C.P.).

Upon compliance with all of the requirements applicable to the adoption of the resolution of necessity, proceedings for the acquisition of property through eminent domain are conducted in the superior court in accordance with Chapter 5 (commencing with Section 1250.010) of Title 7 (Sec. 1250.010, C.C.P.).

With regard to the amount paid to reimburse the owner for the property interest taken, in Redevelopment Agency v. Tobriner, supra, the court stated at page 1098 that the "principle sought to be achieved by the concept of just compensation is to reimburse the owner for the property interest taken and to place the owner in as good a position pecuniarily as if the property had not been taken." According to the court, "there is no constitutional guarantee that the owner of a condemned property will necessarily receive something. If the property interest taken by the government has *no value*, then *nothing* need be given to the condemnee to put him or her in as good a position pecuniarily as if the property had not been taken" (Ibid.; italics in original). The measure of compensation for property taken in eminent domain is the fair market value of the property taken (Id., at p. 1101).

With regard, in general, to the value of contaminated property, in Redevelopment Agency v. Thrifty Oil Co. (1992) 4 Cal.App.4th 469, the court held that the fair market valuation of the property was reached after deducting the costs of remediation and that the contamination of the property was considered by the experts in determining the fair market value of the property (Id., at pp. 473-474 and fn. 9, at p. 474). Therefore, for purposes of determining the fair market value of contaminated property in an eminent domain action brought by a school district, the cost of remediation of that contamination would be included in calculating the fair market value of that property.

There are specific provisions in the Eminent Domain Law applicable only to the acquisition by eminent domain of property by a school district as set forth in Article 8 (commencing with Section 1263.710) of Chapter 9 of Title 7 (hereafter Article 8;

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Sec. 1263.770, C.C.P.) that establish a procedure for both determining the value of the property subject to such an eminent domain proceeding and the financing of a remedial action for that property.

For purposes of Article 8, the terms "remedial action" and "removal" are defined as having the same meaning as in Sections 25322 and 25323, respectively, of the hazardous substance act (subd. (a), Sec. 1263.710, C.C.P.).[8] A "required action" is defined as meaning "any removal or other remedial action with regard to hazardous materials that is necessary to comply with any requirement of federal, state, or local law" (subd. (b), Sec. 1263.710, C.C.P.), and "hazardous material" is defined as having the same meaning as in Section 25260 (Sec. 1263.711, C.C.P.). Subdivision (d) of Section 25260 defines the term "hazardous material" as follows:

"25260. * * *

"(d) 'Hazardous material' means a substance or waste that, because of its physical, chemical, or other characteristics, may pose a risk of endangering human health or safety or of degrading the environment. 'Hazardous material' includes, but is not limited to, all of the following:

"(1) A hazardous substance, as defined in Section 25281 or 25316.

"(2) A hazardous waste, as defined in Section 25117.

"(3) A waste, as defined in Section 470 or as defined in Section 13050 of the Water Code.

* * *"

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[8] Section 25322 generally defines "remedy" or "remedial action" as including, among other things, those "actions which are consistent with a permanent remedy, that are taken instead of, or in addition to, removal actions in the event of a release or threatened release of a hazardous substance into the environment ..." (subd. (a), Sec. 25322), while Section 25323 generally defines "remove" or "removal" as including the "cleanup or removal of released hazardous substances from the environment or the taking of other actions as may be necessary to prevent, minimize, or mitigate damage which may otherwise result from a release or threatened release" (subd. (a), Sec. 25323).

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Section 1263.720 of the Code of Civil Procedure, which applies upon the petition of any party to the eminent domain proceeding, reads as follows:

> "1263.720. (a) Upon petition of any party to the proceeding, the court in which the proceeding is brought shall specially set for hearing the issue of whether any hazardous material is present within the property to be taken.
>
> "(b) If the court determines that any hazardous material is present within the property to be taken, the court shall do all of the following:
>
> "(1) Identify those measures constituting the required action with regard to the hazardous material, the probable cost of the required action, and the party that shall be designated by the court to cause the required action to be performed.
>
> "(2) Designate a trustee to monitor the completion of the required action and to hold funds, deducted from amounts that are otherwise to be paid to the defendant pursuant to this title, to defray the probable cost of the required action.
>
> "(3) Transfer to the trustee funds necessary to defray the probable cost of the required action from amounts deposited with the court pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 or pursuant to Section 1268.110.[9] In the case of any payment to be made directly to the defendant pursuant to Section 1268.010, the plaintiff[10] shall first pay to the trustee the

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[9] Article 1 (commencing with Section 1255.010) of Chapter 6 of Title 7 and Section 1268.110 of the Code of Civil Procedure concern, respectively, the deposit of the probable amount of compensation that will be awarded in the proceeding before the entry of judgment and the full amount of the award after the entry of judgment.

[10] For purposes of Title 7, the plaintiff is the person seeking to take property by eminent domain (Sec. 1250.210, C.C.P.) and the defendants are those persons who appear of record or are known by the plaintiff to have or claim an interest in the property (Sec. 1250.220, C.C.P.).

amount necessary to defray the probable cost of the required action, as identified by the court, and shall pay the remainder of the judgment to the defendant. The total amount transferred or paid to the trustee pursuant to this paragraph shall not exceed an amount equal to 75 percent of the following, as applicable:

"(A) Prior to entry of judgment, the amount deposited as the probable amount of compensation pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6.

"(B) Subsequent to entry of judgment, the fair market value of the property taken, as determined pursuant to Article 4 (commencing with Section 1263.310).[11] If the amount determined as fair market value pursuant to that article exceeds the amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6, that excess shall be available, subject to the 75 percent limit set forth in this paragraph, for transfer to the trustee for the purposes of this paragraph or for reimbursement of the plaintiff for payments made to the trustee pursuant to this paragraph. If the amount determined as fair market value pursuant to Article 4 (commencing with Section 1263.310) is less than the amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6, the plaintiff shall be entitled to a return of amounts thereby deposited, a judgment against the defendant, or both, as necessary to ensure that the total amount transferred or paid to the trustee pursuant to this paragraph not exceed an amount equal to 75 percent of the fair market

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[11] Article 4 (commencing with Section 1263.310) of Title 7 provides that, in an eminent domain proceeding, compensation is to be awarded for the fair market value of the property taken (1263.310, C.C.P.). The fair market value of the property is "the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available" (subd. (a), Sec. 1263.320, C.C.P.).

value of the property taken, as determined pursuant to Article 4 (commencing with Section 1263.310).

"(4) Establish a procedure by which the trustee shall make one or more payments from the funds it receives pursuant to paragraph (3) to the party causing the required action to be performed, upon completion of all or specified portions of the required action. Any amount of those funds that remains following the completion of all of the required action shall be applied in accordance with the provisions of this title that govern the disposition of the deposit amounts referred to in paragraph (3).

"(c) The actual and reasonable costs of the trustee incurred pursuant to this section shall be paid by the plaintiff."

Thus, Section 1263.720 of the Code of Civil Procedure provides a procedure for paying for both the cost of remedial action and the fair market value of the property to the owner. If the amount available to the trustee is insufficient to meet the actual cost incurred by the school district to complete the required action, the school district is authorized to either apply to the court for a new hearing regarding the identification of the probable cost or to complete the required action at its own expense and bring an action against the property owner to recover the additional cost (Sec. 1263.730, C.C.P.). However, the presence of any hazardous material within the property is not to be considered in appraising the property for purposes of Section 1263.720 of the Code of Civil Procedure pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 of Title 7 or Article 4 (commencing with Section 1263.310) of Title 7 (Sec. 1263.740, C.C.P.).

An analysis of the bill that enacted existing Article 8 (Ch. 247, Stats. 1995; S.B. 231 of the 1995-96 Regular Session, as introduced Feb. 7, 1995; hereafter S.B. 231) stated that the purpose of the Article 8 procedure is to "prevent parties and courts from having to speculate about the difficult-to-estimate costs of remediation when determining the amount of a compensation award. Instead, the special escrow process is developed in order to ensure that the exact costs of the remediation are deducted from the compensation award" (Senate Judiciary Committee Analysis, pp. 5 and 6, March 21, 1995).

With regard to the effective date of Article 8, Assembly Bill No. 1024 of the 1991-92 Regular Session (Ch. 814, Stats. 1991) originally added Article 8 to the Code of Civil Procedure,

effective January 1, 1992 (subd. (c), Sec. 8, Art. IV, Cal. Const.). However, as referenced above, S.B. 231 repealed that Article 8 and added the existing Article 8, which includes substantially the same procedure as the former Article 8, but expands remediation under that article to cover "hazardous material," which is a broader term than hazardous substance (compare the definition of "hazardous substance" in subd. (a), Sec. 1263.710, C.C.P., as added by Ch. 814, Stats. 1991, to the definition of "hazardous material" in Sec. 1263.711, C.C.P., as added by Ch. 247, Stats. 1995).

Thus, under the general eminent domain procedure in an action by a school district to acquire property, the cost of remediation is included in calculating the fair market value of the property. However, if a party petitions the court for the use of an Article 8 proceeding, the value of the property, and the cost to remediate the property, are determined by the court in accordance with the special escrow procedure specified in Article 8 which determines the fair market value of the contaminated land by deducting the cost of remediation from the award.

Conclusion

Since January 1, 1991, the governing board of a school district planning to acquire property for a schoolsite, or to construct a school upon a site, that is contaminated with a release of a hazardous waste or a hazardous substance as a result of former industrial activity on that site, has been prohibited by Section [illegible] of the Public Resources Code and Section [illegible] and [illegible] from approving that acquisition or construction unless certain actions occur, including a determination that the site is not, among other things, (1) the site of a current or former hazardous waste disposal site or solid waste disposal site unless, if the site was a former solid waste disposal site, the governing board of the school district concludes that the wastes have been removed, or (2) a hazardous substance release site identified by the Department of Toxic Substances Control in a list adopted prior to January 1, 1999, pursuant to former Section 25356 of the Health and Safety Code.

In addition, since January 1, 1981, Article 11 (commencing with Section 25220) of Chapter 6.5 of Division 20 of the Health and Safety Code has required any school district that owns, or that is the lessor or lessee of property, that knows, or has probable cause to believe, that a significant disposal of hazardous waste has occurred on, under, or into the land, or that the property is within 2,000 feet of such a significant disposal, and that intends to construct or allow construction on that land of a school [illegible] 21 years of age, to apply to the



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Department of Toxic Substances Control prior to construction for a determination as to whether the land should be designated, and its use thereby restricted, a hazardous waste property or a border zone property.

Last, when a school district acquires property pursuant to its eminent domain authority that is contaminated with a hazardous waste or substance, the school district is required to compensate the property owner for the fair market value of the property, taking into account the potential remediation costs. The concept of "just compensation" has been rooted in the Eminent Domain Law since its inception.

Very truly yours,

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